85-944

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. BROOKS,
Commissioner of Labor of the
State of North Carolina,
Appellant,

v.

BURLINGTON INDUSTRIES, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

I. Whether the provisions of an employer's personnel policy or employee handbook, under which employees are promised severance benefits, constitute an "employee benefit plan" within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, so as to preempt statutory actions for the recovery of such benefits under state law?*

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*This same question has been raised in the appeals to this Court from the Second Circuit of *Irving Gilbert, et al. v. Burlington Industries, Inc.*, No. 85-441, and *Lillian Roberts, as Commissioner of Labor of the State of New York v. Burlington Industries, Inc.*, No. 85-460. This Court has invited the Solicitor General to file a brief in those cases expressing the view of the United States.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit were:

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamila B. Apple; Carole Baggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonnie B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara P. Petty; P. Douglas Pierce; Betty Hornaday Ray; Ruth S. Rich; Mary Darlene Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoc; Gladys H. Shore; Frances Simmons; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B. Young; Bettie J. Boswell; Debbie M. Rascoe; Lemmer Sherdina Sellars; Jack T. Sullivan; Claude O. Anders; Eva Barr; Margaret Brindle; Hoyt Cheek, Sr.; Hubert Foltz; Clyde Jarrell; Robert Martin; Thelma Martin; Leslie Morehead; Gerald Moretz; Alice Nelson; Carolyn Rayfield; Daisy Rickey; Ethel Royal; Larry Wright; William K. Anders; Merilla L. Barrier; Diane L. Boehm; Henry M. Brown; Hilda K. Cox; Stephen E. Elmore, Jr.; Richard L. Hall; William Jones; Paul M. King; Robert E. May; William Robert Oman;

Cecil A. Poff; John W. Quick; Clifton Smith; Mary Smith; J. Clay Stiles, III; Bobby S. Tew; Thurma A. Chriscoe; Roy F. Williamson; Betty Albright; Nadine Albright; Boyce J. Asbill; Doris S. Baughan; Larry C. Beane; Melodye Snow Beard; Susan Beasley; Robert N. Blevins; Karen L. Boling; Wanda Bowman; Linda B. Brady; Linda P. Bristow; David Brittain; Marcella Jo Brittain; Mary R. Bullard; Betty S. Byrd; Charles H. Byrd; George M. Byrum; Charles F. Cagle, Jr.; Claude R. Cagle; Ann J. Campbell; Joe J. Cassett; Kimberly Spoon Coats; Garland J. Cole; George C. Cole; Ted Cooley; Clara M. Cox; Phyllis Ingold Cox; Cindy M. Cranford; Tommy L. Cranford; Curtis L. Craven; Jackie Nall Davis; Wayne L. Duggins; Nancy M. Ellison; Herman A. Flynt; Cecil C. Gatlin; Earl Glover; Willard E. Gordon; Rayford B. Grant; James L. Hammer; Donald L. Harshaw; Larry Lee Highsmith; Tommy W. Hill; Kathryn Jeanette Hogan; Carroll D. Hoyle; Sandra Hunsucker; Katherine R. James; Linda Jordan Kennedy; Coy A. Kiser; Marilyn Hewitt Knight; Robert N. W. Knott; Gaynell H. Ledwall; Marguerite M. Lineberry; Shelby L. Logsdon; Marlene B. Lucas; Barbara S. Miller; Juanita K. Moody; Grace H. McNeill; Robert F. McWilliams; Susan B. Pack; Cathy D. Powers; Betty M. Reeves; Van E. Rich; Edwin L. Ridge; Harry Rose; Carol L. Savchak; Lenora C. Shaw; James W. Slaughter; Bobby N. Smith; Mike S. Smith; Imogene N. Snider; John W. Snider; Mary Edith Spoon; Jean A. Stafford; Mozelle A. Stout; Harriett W. Summey; Brenda S. Thomas; Gerald D. Thomas; Frances Freeman Tilley; Hazel S. Bullock; Eurika Plummer; Terriel E. Wessinger, Jr.; Walter G. Williamson; James L. Wilson, Jr.; Mildred C. York; Faye T. Yow; Brian

Dale Manuel; Raymond Claude Evans; A. Gene Heidel; Brenda B. Herndon; Russell W. Herndon; Virginia H. Schulte; Sandra G. Walker; Sharon G. Warren; Shirley W. Welch; and Roger Downs,

Plaintiffs-Appellants, †

and

John C. Brooks, Commissioner of Labor of the State of North Carolina,

Plaintiff-Intervenor-Appellant,

v.

Burlington Industries, Inc.; Calvin A. Michaels; Charles A. McLendon; and Humberto L. Quintana,

Defendants-Appellees.

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†The caption of this case on appeal to this Court does not contain the names of the individual plaintiffs who were also appellants in the United States Court of Appeals for the Fourth Circuit. They are seeking review by filing a separate petition for writ of certiorari in this Court.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit rendered its decision and entered judgment on September 3, 1985. A copy of the Court's opinion is set out in Appendix A. The memorandum opinion and judgment of the United States District Court for the Middle District of North Carolina, Greensboro Division, were rendered on October 17, 1984. A copy of the opinion is set out in Appendix B, and a copy of the judgment is contained in Appendix C.

JURISDICTION

This is a civil action by 200 former employees of Burlington Industries, Inc. (hereinafter "Burlington"), to recover

promised severance pay. After filing complaints with the Wage and Hour Division of the North Carolina Department of Labor and a final determination by that agency that Burlington was in violation of the Wage and Hour Act by failing to pay severance pay, the former Burlington employees brought suit in the Superior Court of Alamance County, North Carolina. The plaintiffs-appellants stated five claims for relief under state statutory and common law, including a claim based on Burlington's failure to pay severance pay in violation of N.C.G.S. § 95-25.7 of the Wage and Hour Act. John C. Brooks, Commissioner of Labor of the State of North Carolina (hereinafter "Commissioner"), moved to intervene in support of the plaintiffs' claim under the Wage and Hour Act. Defendant Burlington filed a petition removing the action to the United States District Court alleging that the claims of the plaintiffs arose under the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (hereinafter "ERISA"), and that the state law claims were preempted. Subsequently, the District Court entered an order allowing the Commissioner to intervene. In addition, the District Court allowed plaintiffs to amend their complaint to set forth additional and alternative claims for relief arising under ERISA and to join three company executives as defendants. Federal jurisdiction over the ERISA claims was predicated on federal question jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) and (f); pendant jurisdiction was asserted with respect to the state law claims.

The United States Court of Appeals for the Fourth Circuit held that N.C.G.S. § 95-25.7 of the Wage and Hour Act was preempted by federal law and entered judgment on September 3, 1985. Plaintiffs-appellants' ERISA claims were also dismissed. No party sought a rehearing. The Commissioner filed a timely notice of appeal in the Court of Appeals on October 15, 1985, a copy of which is contained in Appendix D. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of ERISA, 29 U.S.C. § 1001 *et seq.*, the North Carolina Wage and Hour Act, and regulations promulgated by the United States Secretary of Labor are set out in Appendix E.

STATEMENT OF THE CASE

1. Material Facts

The plaintiffs in this cause of action are all former salaried employees of the Burlington Socks and Hosiery Divisions who were employed in defendant's North Carolina plant and office locations.[1] Effective January 3, 1982, Burlington sold the Socks and Hosiery Divisions to Kayser-Roth Corporation as on-going concerns and plaintiffs were terminated from Burlington's payroll. In order to enhance the sale of these divisions by insuring that its employees would accept employment with Kayser-Roth, Burlington agreed to use its best efforts to encourage all salaried and wage employees to become Kayser-Roth employees. This included an agreement by Burlington that no employee of the Socks and Hosiery Divisions could be rehired by Burlington for a period of six months after the sale. Subsequently, the plaintiffs were employed by Kayser-Roth, in most cases in jobs similar to the jobs which they held at Burlington. Many of the plaintiffs also worked in the same locations. However, most of the employees from the J. Spencer Love facility were transferred to a Kayser-Roth facility approximately 22 miles away. This required an additional 44 miles of travel by these employees to and from work.

Since at least 1953, Burlington has had a policy of

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[1]Other Socks and Hosiery Division employees within the United States were located in Tennessee and New York. The New York merchandising employees are plaintiffs in the case of *Irving Gilbert, et al. v. Burlington Industries, Inc.*, which is on appeal to this Court from the Second Circuit, No. 85-441.

paying severance pay to employees who are involuntarily terminated from employment with the company. At the time of the sale, the severance policy appeared in a Company Policy Manual which was only distributed to management personnel, but was available to most employees on request.[2] The policy was disseminated to all salaried

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[2]At the time of the sale, the Company Policy Manual read in pertinent part:

I. *Company Policy*

A. *General*—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. *Payments*—Payroll severance payments are based upon tables contained in this policy. . . .

II. *Application of Policy*

A. *Payroll Severance*—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

1. *Eligibility*—Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:

a. *Job Elimination*—This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

b. *Other Involuntary Terminations*—These are terminations due to unsatisfactory job performance which is not willful. . . .

2. *Ineligibility*—Employees are not eligible to receive payroll severance if:

a. *Temporary Full-Time, Temporary Part-Time Employees*—Employees assigned to these employment classifications are not eligible for payroll severance payments.

b. *Ineligible Full-Time Employees*—Employees who are terminated because of early retirement, mandatory retirement, death, misbehavior, lack of cooperation, willful negligence, or other unfriendly acts against the Company or towards its management are not eligible for payroll severance payments.

ployees, beginning in 1976, in the Salaried Employees' Handbook.[3]

Shortly before the sale to Kayser-Roth, Burlington announced to its Socks and Hosiery employees that severance pay would not be paid since Kayser-Roth would be employing them. Employees who did not accept employment offered by Kayser-Roth also would not be paid severance pay.

The shocked and disillusioned employees complained to the Wage and Hour Division of the North Carolina Department of Labor concerning Burlington's decision not to pay severance. The Wage and Hour Division began its investigation of Burlington's severance pay practices before the sale to Kayser-Roth took place, and a Wage and Hour Compliance Officer informed Burlington of his preliminary determination that the severance pay was due to the employees pursuant to the North Carolina Wage and Hour Act, N.C.G.S. § 95-25.1 *et seq.* After the sale took place, the investigation was completed and a final determination was reached by the Director of the Wage and Hour Division that Burlington was in violation of N.C.G.S. § 95-25.7,

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[3] The Salaried Employees Handbook effective at the time of the sale contained the following provision:

> SEVERANCE PAY.
>
> The Company provides severance pay to full-time employees who involuntarily leave the Company. Pay ranges from two weeks to twelve weeks, based on the employee's age and length of continuous service with the Company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits.

for failure to pay all wages due upon termination.[4]

Burlington's severance pay policy was administered by Burlington through its personnel and payroll departments, and was actually designated as "payroll severance." The amount of severance paid to salaried employees was set forth in payment schedules based on age and length of service with Burlington. It was automatically paid in periodic installments by Burlington following termination of employment and according to the employee's normal pay schedule. Severance pay was treated like wages, with all legal withholding deductions such as income tax and social security tax. Severance payments were made out of Burlington's general assets. The company did not segregate any assets from which to pay severance pay and it maintained no fund, trust or separate account from which severance payments were made. An employee receiving severance pay would continue to receive severance pay even if he obtained employment with a company other than Burlington. The Company Policy Manual provided that the periodic severance payments would terminate only if the employee was re-employed by Burlington.[5] Since the

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[4] N.C.G.S. § 95-25.7 reads in pertinent part as follows:

> *Payment to separated employees.*—Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday.

N.C.G.S. § 95-25.2(16) defines wages in pertinent part as follows:

> For the purposes of G.S. 95-25.6 through G.S. 95-25.12, "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

[5] The Policy Manual provided at the bottom of the payment schedule:

> No severance pay is paid beyond age 70, beyond the monthly pay period in which death occurs, and upon re-employment *by the company.*

(Emphasis added.)

manual did not preclude severance pay for re-employment by another firm, Burlington's severance pay policy was not a form of unemployment insurance.

Prior to the sale of the Socks and Hosiery Divisions, Burlington never treated its severance policy as being governed by ERISA and never complied with ERISA's formal reporting and disclosure requirements. Burlington held no assets in trust and did not appoint any trustees to manage the policy. Nor did Burlington designate a fiduciary for the policy, publish or file an annual report, a financial statement, or a plan description, as required by ERISA. During the investigation and administrative proceedings leading up to the final determination by the North Carolina Wage and Hour Division, Burlington never interposed ERISA as a defense to the Division's determination and no claim of preemption was made.

2. Proceedings in the Court Below

The individual plaintiffs commenced this action to recover severance pay by filing a complaint on February 24, 1983, in the Superior Court of Alamance County, North Carolina. The complaint filed in State Court alleged claims for severance pay based on the common law of contracts, the North Carolina Wage and Hour Act, and damages for violation of the North Carolina Unfair or Deceptive Trade Practices Act. On March 17, 1983, John C. Brooks, Commissioner of Labor of the State of North Carolina filed a motion seeking permission to intervene in the action in support of the plaintiffs' claims under the Wage and Hour Act. On March 28, 1983, Burlington filed a petition removing the action to the United States District Court alleging that the claims of the plaintiffs arose under ERISA.

On April 22, 1983, the District Court entered an order allowing the motion to intervene by the Commissioner. On June 16, 1983, the plaintiffs filed a motion to amend their complaint to set forth additional and alternative claims for

relief arising under ERISA and to join three individual defendants, all executives of Burlington. This motion was subsequently allowed. On July 29, 1983, the plaintiffs filed a motion for preliminary injunction seeking to enjoin Burlington from refusing to consider the plaintiffs for re-employment because of their participation in this lawsuit.

On April 23, 1984, Burlington filed a motion for summary judgment claiming that the state law causes of action were preempted by ERISA and that it was entitled to summary judgment on the ERISA cause of action. On that same date, the Commissioner filed a motion to dismiss for lack of federal jurisdiction and to remand the case to the State Court. The plaintiffs filed a motion for partial summary judgment.

The Commissioner moved to dismiss all claims predicated on ERISA on the grounds that the severance pay policy promulgated by Burlington is not a "plan" under the terms of ERISA. If Burlington's promise to pay severance is not a plan within the ambit of ERISA, the Commissioner argued, there is no federal question and no jurisdiction in the District Court. Furthermore, claims pursuant to the North Carolina Wage and Hour Act would not be preempted. The Commissioner argued to the District Court that both the legislative history and the statutory scheme of ERISA demonstrate that the Act was not intended to regulate mere employer promises to employees which are paid out of general assets. He further argued that to be regulated by ERISA, the plan must have a trust, structure or identity which is separate and distinct from the employer and must meet the formal requirements of the Act. The Commissioner also relied on a U.S. Department of Labor regulation which excluded from ERISA's coverage employer payroll or compensation practices where payments were made to employees directly from the employer or from general assets of the employer.

On October 17, 1984, the District Court issued a decision

and order granting Burlington's motion for summary judgment on the state law causes of action and also on the ERISA causes of action.[6] The court denied the Commissioner's motion to dismiss, holding simply that the U.S. Secretary of Labor treats severance benefits as an employee welfare benefit plan and other courts have consistently held that severance pay benefits were employee welfare benefit plans under ERISA. The District Court also concluded that ERISA's funding requirements do not apply to employee welfare benefit plans such as a severance pay benefit, but did not address the question of whether an ERISA plan must have an existence or identity of its own which is more than a promise or agreement to pay benefits. Nor did the District Court grapple with the Secretary's regulation that distinguishes the payment of certain benefits from welfare benefit plans, even though those same benefits are listed in ERISA's definition of an employee welfare benefit plan. After the District Court entered its judgment dismissing the action, notices of appeal to the Fourth Circuit Court of Appeals were filed by the Commissioner of Labor and the plaintiffs.

On September 3, 1985, the Court of Appeals affirmed the District Court. The court held that Burlington's severance pay policy is an employee welfare benefit plan subject to ERISA and that ERISA preempts the state law claims asserted in this case. The court rejected the argument of the Commissioner and the *amici*[7] that a mere promise or agreement to pay severance, without more, does not constitute a welfare benefit plan within the meaning of ERISA.

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[6] Plaintiffs in this action are filing a petition for writ of certiorari in this Court asserting error by the District Court and the Fourth Circuit Court of Appeals in granting defendants' motion for summary judgment and thereby denying and dismissing plaintiffs' federal and state law claims. *Bill N. Slack, et al. v. Burlington Industries, Inc., et al.*, No. 84-2241(L) (4th Cir. September 3, 1985).

[7] The Commissioner was joined on the appeal by officials from ten states and the District of Columbia who filed a brief as *amici curiae*.

The court did not consider whether there was direct contract liability by the employer based on the severance pay agreement between the employer and its employees which is enforceable under state law. The court also rejected the Commissioner's arguments that the legislative history and statutory language dictate that before an ERISA plan can be found, there must be a funded trust or some cognizable entity separate and apart from the employer. The court further rejected the Commissioner's reliance on the regulation of the U.S. Department of Labor which distinguished benefits provided to employees as payroll practices from the same enumerated benefits referred to in ERISA's definition of a welfare benefit plan.[8]

REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE SUBSTANTIAL QUESTION PRESENTED BY THIS APPEAL

This appeal presents to the Court a heretofore unanswered question of great importance to millions of employers and employees and to all fifty states: When does an employer's promise to pay a benefit mentioned in ERISA constitute an ERISA employee welfare benefit plan? In other words, what is the definition of "plan, fund, or program" as used in ERISA's definition of "welfare benefit plan"?

In reaching its decision that ERISA preempts North Carolina's Wage and Hour Act as a state law which relates to an employee welfare benefit plan, the court below concluded that Burlington's bare promise to give severance

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[8]The Commissioner also contended in both the District Court and the Court of Appeals that, even if Burlington's severance policy was subject to ERISA, the North Carolina Wage and Hour Act was not preempted because it does not regulate the terms and conditions of the plan, but simply enforces payment of compensation promised by an employer. The Commissioner also argued that the Wage and Hour Act is implicitly exempted from ERISA's preemption as a valid exercise of the State's police power under the Tenth Amendment. The Commissioner does not raise these issues in this appeal.

pay out of its general assets constitutes a welfare benefit plan. The court concluded that the promise of an ERISA-type benefit is necessarily a plan subject to ERISA regulation. The United States Secretary of Labor, on the other hand, has recognized through regulations that not all promises by an employer to give benefits listed in ERISA constitute welfare benefit plans. Indeed, several examples of such non-plan promises are listed in those regulations. The Secretary's regulations, however, do not attempt to define the precise dividing line between employer policies which do and do not establish plans. Thus, the task of giving a more precise definition of "welfare benefit plan" was left to the judicial branch and is now presented to this Court.

In that not every employer policy offering ERISA-type benefits is a "plan, fund or program" regulated by ERISA, it is of great moment to have a clear statement by this Court as to just what ERISA means by those terms. The majority of states, including North Carolina, have wage payment collection laws which enforce the payment of many of the same benefits listed in ERISA. The states' right to continue enforcing these laws depends on the extent to which employer promises to pay benefits do not constitute ERISA employee benefit plans, since ERISA preempts state laws which relate to ERISA plans. Millions of employees will be affected by this definition, because state laws provide them with a more favorable legal framework and better administrative assistance for collecting unpaid benefits. Likewise, employers have great interest in this question. Depending upon the definition of "plan" given by this Court, millions of employers may be required to comply with the complex filing and fiduciary requirements of ERISA in instances where they now believe that their bare promises of benefits do not trigger such requirements.

The question presented to the Court is one of statutory interpretation. Both the provisions of ERISA and the legislative history suggest that Congress intended ERISA to regulate benefit plans which are entities separate and apart

from the employers who establish them and which are either funded or capable of being funded. Congress surveyed all state and federal laws in existence at the time of ERISA's enactment which purported to regulate the benefit arrangements which concerned them and found those laws lacking. Specifically, Congress considered state trust laws and found them inadequate to regulate all the various types of entities that employers had created for the provision of benefits. On the other hand, Congress never mentioned any wage payment collection laws in its review of relevant laws. With the pervasive presence of these wage collection laws, Congress could not possibly have overlooked them. Instead, the only tenable assumption is that Congress did not consider these laws relevant to the benefit arrangements ERISA was to regulate. Insofar as state wage collection laws and state common laws of contract were already providing an adequate means to employees to enforce bare employer promises to pay benefits from general assets, Congress clearly intended to limit ERISA's regulatory scope to plans which are separate entities from the employer and which have or could have assets of their own.

A previous decision of this Court supports the correctness of distinguishing benefit plans as separate entities regulated by ERISA from employer promises to give benefits which are not so regulated. Moreover, the Third Circuit Court of Appeals has followed this Court's precedent and has produced a line of decisions conflicting with the decision on appeal here from the Fourth Circuit.

As the foregoing demonstrate, there is both a significant need and a substantial basis for this Court to define employee welfare benefit plan, as encompassed by ERISA, in a more precise and narrow manner than did the court below.

I. The Commissioner Presents The Substantial Question Whether A Promise Or Agreement To Pay Severance, Without More, Does Not Constitute A Welfare Benefit Plan Within The Meaning Of ERISA.

Congress enacted ERISA in an effort to protect employees whose pensions, annuities, retirement and other benefits were tied up in and dependent upon complex plans about which they knew little or nothing, and some of which were fraudulently or negligently mismanaged and subject to haphazard regulation. It sought to regulate pension plans and, to a lesser extent, other types of benefit plans, in order to help insure employees a modicum of security in the expectation of benefits. As Congress declared, "the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . . , that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided . . . ." 29 U.S.C. § 1001(a).

In the instant case, whether Burlington's practice of granting severance pay is a "plan" governed by the provisions of ERISA is a threshold question. If it is not a plan within the ambit of ERISA, then North Carolina's statutory and common law are not superseded or preempted and the provisions of ERISA do not affect or have application to plaintiffs' right to recover. The court below erred in concluding that Burlington's promise to pay severance pay is an "employee welfare benefit plan" subject to ERISA.

A. Not Every Promise by an Employer to Pay Benefits Listed in ERISA Constitutes a Welfare Benefit Plan.

The court below concluded that severance pay is a benefit listed in the definition of welfare benefit plan, but it never answered the question of whether every promise to pay severance benefits constitutes a welfare benefit plan regulated by ERISA. The Secretary of Labor, on the other hand, has adopted regulations demonstrating that even though an employer has promised to pay a benefit listed in ERISA, it is also necessary to ascertain whether a benefit

plan exists before determining coverage by ERISA. When vacation pay, holiday pay, sick pay and similar wage-related benefits are paid by the employer from its general assets, the Secretary has concluded that those benefits are provided by means of payroll practices rather than as part of a benefit plan. *See,* 29 C.F.R. 2510.3-1(b). This regulation implicitly, if not explicitly, recognizes that the mere promise of the listed benefits by an employer falls short of establishing a welfare benefit plan. While this regulation has been questioned, it has been upheld as a reasonable administrative interpretation due deference by the courts. *See, e.g., California Hospital Association v. Henning,* Nos. 83-6381 & 83-6416 (9th Cir. September 6, 1985);[9] *National Metalcrafters v. McNeil,* 602 F. Supp. 232 (N.D. Ill., 1985). The regulation, however, stops short of giving a precise definition of welfare benefit plan under ERISA. Thus, the Secretary states "this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(1) [of ERISA]." The substantial question raised by this appeal but, by the Secretary's candid admission, left open by his regulations, is a precise definition of "welfare benefit plan."

B. An ERISA Plan Must Have an Identity of Its Own

The question left unanswered by the Secretary's regulations and now presented to this Court is one of statutory

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[9] In the *Henning* decision, the Ninth Circuit held that an employer's promise to give vacation pay from its general assets constituted a payroll practice under the Secretary's regulation rather than a welfare benefit plan under ERISA. The Ninth Circuit currently has under consideration a motion for rehearing of its decision. Regardless of the ultimate outcome of that case, it appears that the losing party will likely appeal to this Court raising an issue similar to the one presented in this appeal, namely, when is an employer's promise to pay a benefit listed in ERISA not an employee welfare benefit plan.

interpretation. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an "employee welfare benefit plan" or "welfare plan" as:

> [A]ny plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Few courts have grappled with interpreting § 3(1) of ERISA, but it is clear from the definition itself that an ERISA covered welfare plan must be (1) a plan, fund, or program, (2) established or maintained, (3) by an employer or by an employee organization, or both, (4) for the purpose of providing the benefits enumerated in § 1002(1)(A) or described in § 302(c) of the Labor Management Relations Act ("LMRA"), (5) to participants. *See, Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982). However, although it is clear on its face that the statute covers any plan, fund or program, the terms "plan" and "program" are not defined in the statute. Therefore, it is necessary to look at the structure of ERISA's regulating provisions and the intent of Congress to distinguish a welfare benefit "plan" covered by ERISA from mere benefits.

The statutory scheme for ERISA demonstrates that Congress contemplated that a "plan" under ERISA would have

a structure giving it an identity of its own separate and apart from the employer. Sections 1102(a) and (b) of the Act suggest what features must be present before a plan can be said to exist, such as a written instrument which (1) names a fiduciary, (2) provides a procedure for establishing and carrying out a funding policy, (3) allocates responsibility among those who will operate and administer the plan, (4) establishes procedures for amending the plan, (5) identifies the persons who will have the authority to amend, and (6) specifies the basis on which payments will be made to and from the plan. Under 29 U.S.C. § 1022, a plan administrator is required to file a "plan description" with the United States Department of Labor and to distribute a summary of that plan description to participants and beneficiaries. ERISA also requires the plan administrator to publish and file an annual report for the plan. 29 U.S.C. § 1023 and 1024. Additionally, employers must establish and maintain procedures for the timely handling and disposition of day-to-day benefit claims including an understandable written notice setting forth the specific reasons for denial of a claim and a full and prompt fair review of the denial. 29 U.S.C. § 1133.

In addition to the mechanics of establishing a plan, ERISA defines the terms "welfare plan" and "employer" as separate entities. Compare 29 U.S.C. § 1002(1), which provides that the "terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program . . . established or maintained by an employer . . . ," with 29 U.S.C. § 1002(5), which provides that "the term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, *in relation to an employee benefit plan* . . . ." (Emphasis added.) Although they may exist in relationship to one another, the plan and the employer that established it are separate entities and each must have an identity of its own. *See also,* 29 U.S.C. § 1132(d)(1) ("an employee benefit plan may sue or be sued . . . as an entity"); 29 U.S.C. § 1132(d)(2) ([a]ny money judgment . . . against an employee benefit plan shall

be enforceable only against the plan as an entity and shall not be enforceable against any other person"); 29 U.S.C. §§ 1106(a) and 1107 (wherein it is assumed that a plan and the employer that established it are separate entities and, on the basis of that assumption, certain transactions between them are prohibited.

The language of the statute and the legislative history clearly demonstrate that for a "plan" as defined by ERISA to exist, the "plan" must either have a source of financing independent from the general assets of the employer or commit itself to establishing a funding policy that will assure that an adequate proportion of the employer's income will be dedicated to the plan.[10] ERISA's legislative history and the Act's formal name clearly demonstrate that its drafters were principally concerned with controlling the kinds of abuses typical of funded pension plans. The purpose of ERISA was to regulate a relatively modern economic institution which, in the years following World War II, had experienced phenomenal expansion. H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 2-3, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4640-41. Several years of hearings and studies by Congress revealed substantial problems in the area of pension plan vesting, funding and fiduciary conduct. "The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private *accumulation* of funds which have escaped the imprimatur of effective federal regulation." H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Admin. News, p. 4641. (Emphasis added.) With respect to these plans, participants were left to rely upon the state common law of trusts, which Congress

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[10] In its *amicus curiae* brief in the case of *California Hospital Association, et al. v. Patrick W. Henning, etc., supra,* the Solicitor of Labor submitted that the existence of a separate fund with plan assets is both the critical factor and a reasonable basis for distinguishing ERISA covered plans from payroll practices that provide benefits paid from an employer's general assets.

found inadequate. Congress' concern was clearly not directed at employer personnel policies, employment contracts and employer compensation practices, which were hardly recent phenomenon and which had been for years effectively regulated and enforced by state wage payment statutes and common law contract principles. In fact, in its review of all state and federal laws which regulated the plans to be addressed by ERISA, Congress made not a single reference to the ubiquitous presence of the states' common law of contracts or their wage payment collection laws. Certainly some mention of these laws would have been made had Congress been concerned with the types of employer promises of benefits already successfully regulated by these state laws. Since Congress set out merely to control abuses of pension vesting, funding and fiduciary abuses, an overly-expansive reading of the term "benefit plan" to include all unfunded severance agreements, generally involving smaller amounts of money, would result in a gross distortion of Congress' purpose.

The foregoing analysis clearly indicates that ERISA and Congress contemplated a creature quite different from Burlington's severance pay policy which is funded out of its general assets and which had none of the formal documents and structure required for an employer welfare benefit plan subject to ERISA plan. It is hardly credible to argue that Burlington's policy was a "plan" within ERISA where none of the characteristics of an ERISA plan are found. Burlington's severance pay policy is nothing more than the employer's agreement to pay severance wages as part of an employer's overall compensation and is not a "plan" covered by ERISA.

Further, this Court has recognized the distinction between an employer that sponsors a plan and the separate entity of the plan itself in the case of *Nachman Corporation v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980). In *Nachman,* it was determined that while a liability disclaimer clause

disclaimed any assumption of direct contractual liability by the employer to pay the unfunded portion of certain benefits, it did not make the employees' right to those benefits conditional as against the plan itself. The opinion contemplates that an employer can either choose not to establish a plan, in which case it can also choose whether or not to obligate itself to pay benefits out of its general assets, or, alternatively, it can choose to establish a plan and either assume or not assume direct liability for any deficiencies in plan assets. In either case, the extent to which the employer is *directly* liable to its employees is a question to be decided in accordance with the terms of the contract into which it has entered.

The *Nachman* analysis leads to four conclusions: (1) there is a meaningful distinction between "employers" and "plans"; (2) for an "employee welfare benefit plan" to be established or maintained within the meaning of the Act, it must be so constituted as to have an identity and character of its own, as distinct from that of the employer; and (3) to the extent that an employee seeks to enforce his rights as against a "plan," he must do so under ERISA, *see* 29 U.S.C. §§ 1132 and 1144(a); but (4) to the extent that he seeks to enforce any rights directly against his employer, his cause of action lies in contract. Hence, recovery of promised severance pay or other benefits from an employer, as opposed to recovery from a "plan," is not preempted by ERISA. Statutory and common law remedies remain viable and should not have been dismissed by the court below. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

C. To Qualify as a Severance Pay Employee Benefit Plan Within the Meaning of ERISA, the Plan Must Be Funded.

To qualify as an "employee welfare benefit plan," 29 U.S.C. § 1002(1)(B) requires that the plan, fund, or program have as its purpose the provision of any benefits described in Section 302(c) of the LMRA, 29 U.S.C. § 186(c). This section of the LMRA or Taft-Hartley Act, entitled "Restrictions of payments to employee representatives," outlaws any payment or loan, with the exception of payments to certain trust funds, by management to union representatives, and was designed to prohibit all forms of extortion and bribery in labor-management relations. The incorporated section refers to:

> money or other things of value paid by any employer to a *trust fund* established by such representative for the purpose of *pooled* vacation, holiday, *severance* or similar benefits, or defraying costs of apprenticeship or other training programs . . . .

29 U.S.C. § 186(c)(6) (emphasis added).

In 29 C.F.R. § 2510.3-1(a)(3), the United States Department of Labor indicated that only paragraph (6) of § 302(c) of the LMRA describes benefits not already listed in § 1002(1)(A) of ERISA. He concluded that the benefits described in the LMRA but not in § 1002(1)(A) are " * * * holiday, severance or similar benefits." The effect of this section of the Act according to the Secretary is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar, for example, benefits which are in substance severance benefits, although not so characterized. The court below erroneously interpreted this regulation to mean that any employer arrangement or promise to offer these benefits is an ERISA welfare benefit plan. The same regulation, however, later distinguishes payroll practices through which an employer offers these benefits as not constituting

an ERISA plan. *See,* 29 C.F.R. § 2510.3-1(b). Thus, the regulation relied on by the court merely lists benefits which are properly the subject of an ERISA plan, rather than defines what is a plan.

Furthermore, the clear statutory language of the LMRA which has been specifically incorporated into ERISA provides that a *trust fund* established for the purpose of *severance* benefits is a welfare plan under ERISA. Therefore, to qualify as a welfare plan under ERISA, a plan to provide severance benefits must have been established as a trust fund. The cross-reference to the Taft-Hartley Act suggests that Congress sought to specifically include all historically regulated plans, including certain traditionally *funded* plans negotiated in accordance with that statutory scheme.[11]

The court below also erred in relying on the 1980 amendments to ERISA to bolster its conclusion that a mere promise to pay severance is a welfare benefit plan. These amendments authorized the Secretary of Labor to issue regulations making a distinction between severance welfare benefit plans and pension plans. 29 U.S.C. § 1002(2)(B). This 1980 amendment was necessary because of confusion that could arise with regard to severance pay and pension plans pursuant to the language of 29 U.S.C. § 1002(2). Because pension plans were broadly defined to include retirement income, or any other payment of income which

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[11] In its *amicus curiae* brief in the case of *California Hospital Association, et al. v. Patrick W. Henning, etc., supra,* this is precisely the argument advanced by the Solicitor of Labor, who stated that the Act's cross-reference to the Taft-Hartley Act suggests that Congress merely sought to include all historically regulated plans, including traditionally funded vacation and holiday plans negotiated in accordance with that statute.

may not be so denominated but which is in substance retirement income, it was arguable that severance pay policies, which traditionally provide for the payment of income after an employee's termination date, might be confused with pension plans for purposes of ERISA.[12]

The Secretary of Labor had promulgated regulations in 1975 and in 1979 clarifying the common understanding that severance pay is not a form of pension benefits. *See,* 29 C.F.R. § 2510.3-2. The Secretary explained 29 C.F.R. § 2510.3-2, by indicating that a severance pay plan that is not a pension plan *may,* but is not required to be an employee welfare benefit plan.[13]

Although the legislative history of this amendment is sparse, it does appear that Congress agreed with the actions of the Secretary in differentiating between severance payments and pension plans and exempting severance pay from the stringent pension fund requirements. However, the regulation implicitly approved by Congress in 1980, recognized that a severance pay program which is not a pension plan *may,* but is not necessarily required to be a welfare benefit plan. Thus, in retroactively authorizing the Secretary's rules, there is no indication in the legislative history that Congress addressed the question as to whether all severance pay policies are in fact welfare benefit plans.

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[12] The designation as a pension plan under ERISA is particularly significant because of the additional and stringent requirements for vesting and funding which apply to "pension plans," *see,* 29 U.S.C. §§ 1053 and 1082, but which do not apply to "employee welfare benefit plans," *see,* 29 U.S.C. §§ 1051(1) and 1081(a)(1).

[13] The Secretary's commentary explained the regulation in part as follows:

> Finally, the Department is taking this opportunity to point out that a severance pay plan which meets the conditions of the regulations and thus is not a pension plan under section 3(2) of ERISA, *may* nonetheless constitute an employee welfare benefit plan under section 3(1) of ERISA.

44 Fed. Reg. 11763 (March 2, 1979).

In originally enacting ERISA, Congress very carefully distinguished severance pay plans under the LMRA from other named benefits. The 1980 amendments to ERISA and their legislative history do not in any way vitiate the original intent by Congress to include only funded severance pay arrangements within the meaning of ERISA. Hence, benefits which are formally denominated as severance pay, but which have features which make them pension benefits in substance are subject to ERISA's stringent vesting and funding requirements for pension plans. However, absent the indicia of a pension plan, the question still remains as to whether a severance pay arrangement is a welfare benefit plan or merely a direct employer promise outside the scope of ERISA.

II. This Court Should Grant Plenary Consideration On Appeal Because The Questions Presented Are Of Great Importance To Virtually All States And To Millions Of Persons Employed In Those States.

The resolution of the issues presented in this case has far reaching consequences affecting virtually all, if not all, states. Forty-six (46) states and the District of Columbia have statutes which require payment of wages, similar to the North Carolina statute which was held below to be preempted. Of these forty-seven (47) jurisdictions, thirty-one (31) enforce payment of promised severance pay under their wage collection statutes. Moreover, in nearly all, if not all, fifty states, promised severance payments are enforceable under each state's common law of contracts, which was also held below to be preempted.

The issue of preemption of these state laws and statutes is significant for several qualitative reasons beyond the sheer quantitative effect of voiding so many state laws. First, the question is presented whether Congress intended ERISA to upset the traditional balance between state and federal enforcement of employee compensation. Other

federal laws regulating employee compensation do not seek to impose national uniformity through broad preemption provisions, but instead permit the states to provide more stringent protections if they wish. *See, e.g.*, the Fair Labor Standards Act, 29 U.S.C. § 218; the Age Discrimination in Employment Act, 29 U.S.C. § 633; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000h–4. Partially in response to this encouragement and, in part, to reinforce and facilitate the common law mechanisms of employee compensation enforcement, the vast majority of states have adopted wage payment collection statutes. Thus, one of the significant issues brought before the Court is whether the numerous state regulatory schemes encouraged by Congress through other enactments which continue to exist are suddenly and decisively voided by ERISA.

Second, is the deleterious impact which ERISA preemption of state laws will have on the ability of millions of employees to collect their severance benefits. This impact results from both a loss of access to enforcement assistance under state laws and to the less onerous standard of conduct which applies to fiduciaries under ERISA than applies to employers under state laws. Each of the thirty–one jurisdictions having a statute enforcing promised severance pay provides administrative assistance to employees in substantiating and collecting their claimed benefits. Combined, these states and the District of Columbia maintain staffs of more than 1,000 persons to provide this assistance. Should the administrative assistance fail, eighteen of those thirty–one jurisdictions can seek criminal sanctions and twenty–one can file civil suit on behalf of employees against violating employers. Such assistance is critical to employees because in many instances the number of employees and the amount of money involved in a severance claim is so small that the cost to the employee of pursuing the claim on his own is prohibitive. These resources are either clearly lacking or greatly diminished for the employee in claims arising under ERISA.

There are no provisions in ERISA for criminal sanctions for nonpayment of benefits. Moreover, the administrative and litigation assistance offered by the United States Department of Labor under ERISA is substantially less, if it exists at all.[14]

Should the decision below be allowed to stand, not only will employees seeking to recover severance pay lose significant state assistance, but they will also have a more difficult standard of proof. In the case at bar, the Court of Appeals below held that Burlington's decision not to pay severance pay to its terminated employees was not arbitrary and capricious. Based on this standard, the plaintiffs-appellants were denied relief under ERISA[15] Under the state wage collection statute and common law contract theories, the employees need only show the employer's contractual obligation to pay the benefits sought and the breach of that promise. In fact, the North Carolina Department of Labor had determined that the Burlington employees were due severance pay under the North Carolina Wage and Hour Act.

The question of whether ERISA will decrease the likelihood that employees will recover promised severance pay is significant for several reasons. First, such a result is contrary to the stated Congressional intent in adopting ERISA to increase the protection for participants and bene-

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[14] For example, North Carolina has eighteen (18) compliance officers to investigate and resolve complaints of nonpayment of wages, including severance pay. By comparison, the Atlanta regional office of the Labor Management Services Administration, which among its other duties enforces ERISA, has ten (10) investigating officers to handle complaints in a four state area, including North Carolina. None of its investigators reside in North Carolina. By sheer remoteness, size of territory and lack of numbers, the federal staff cannot approximate the administrative assistance offered by the State of North Carolina.

[15] This issue will be raised by plaintiffs-appellants *Bill N. Slack, et al.*, in their petition to this Court for writ of certiorari.

ficiaries of employee plans. *See,* 29 U.S.C. § 1001, Findings and Declaration of Policy. Should this Court let stand the decision below, then ironically ERISA's application may well have the opposite effect of that intended by Congress in that employee protection will have actually decreased rather than increased as a result of ERISA.

Second, decreasing the likelihood that employees will receive their promised severance pay will adversely affect the states and their citizens. Protection of the financial and, hence, general wellbeing of wage earners and their families has been an area of significant state interest and action. If employees are not paid their severance wages when due, they and their families often suffer severe financial hardships. Many wage earners live on such tight budgets that the loss of just one paycheck can result in a family crisis. Rent goes unpaid, utilities are shut off, or sufficient amounts of food and other necessities are not affordable. States have a substantial interest in preventing such hardships by assuring prompt payment of all severance wages. When earned severance wages go unpaid and financial crises strike families, states often bear additional financial burdens through social service programs designed to protect the general welfare of the states' citizens. Unemployment benefits, general and special assistance, and other costly forms of social relief increase when earned wages go unpaid. These social programs cost the states and their taxpayers great sums of money. It is very much in the states' interest to minimize these expenses by enforcing payment of all severance wages earned.

III. The Court Should Grant Full Consideration On Appeal To Resolve A Conflict Between Circuit Courts Of Appeals

In the decision on appeal here, the Fourth Circuit Court of Appeals held that the preemption provision of ERISA precludes a lawsuit against an employer under state wage payment collection laws to enforce the employer's direct promise to make payments of benefits. The Third Circuit

Court of Appeals, on the other hand, in *Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3rd Cir. 1983), held that the preemption provisions of ERISA do not preclude a lawsuit against an employer under a state wage payment collection law to enforce an employer's direct promise to make payments into an ERISA covered employee benefit plan. To the extent that one decision interprets ERISA to permit lawsuits under state law to enforce direct employer promises while the other does not, the decisions of these Circuits are in conflict, and it is appropriate for this Court to give full hearing to the present appeal in order to resolve that conflict.

In the *Ambrose* case, the Carpenters Health and Welfare Fund of Philadelphia and Vicinity (the "Fund") filed suit against Ken R. Ambrose, Inc. ("Ambrose, Inc.") to recover delinquent contributions owed to the Fund under a collective bargaining agreement. Recovery was sought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1976). A pendant state claim also sought to recover the contributions and to collect liquidated damages equal to 25% of the amount owed, as provided under the Pennsylvania Wage Payment Collection Law ("WPCL"), PA. STAT. ANN. tit. 43, § 260.1–.11 (Purdon Supp. 1983–84). The district court held Ambrose, Inc. liable both for the delinquent contributions under the LMRA and the WPCL and for the 25% liquidated damages under the WPCL. On appeal to the Third Circuit, Ambrose, Inc. argued that the WPCL was preempted by the LMRA and ERISA. The Court of Appeals dismissed this contention outright:

> The Ambroses also argue that the district court acted without jurisdiction on the WPCL claims and they further contend that the WPCL is preempted by the LMRA and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1976), *amended by* the Multiemployer Pension Plan Amendment Act of 1980,

> 29 U.S.C. § 1145 (Supp. V–1981), we find that these contentions are without merit.

Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc., supra, 727 F.2d at 282, n.5. Thereafter, the Circuit Court upheld the district court's award of delinquent contributions and liquidated damages under the WPCL.

The Third Circuit does not state in its *Ambrose* opinion a rationale for rejecting ERISA preemption of the Pennsylvania WPCL. While this could be taken as a sign of a lightly considered decision, the better explanation would appear to be that the Third Circuit thought the question had been adequately considered and explained in its earlier decision in *Murphy v. Heppenstall Co.,* 635 F.2d 233 (3rd Cir. 1980), *cert. denied,* 454 U.S. 1152 (1982). In that case, retired employees sued their employer to recover the difference between pension payments guaranteed by the Pension Benefit Guaranty Corporation ("PBGC") and those provided for in a pension agreement which had resulted from collective bargaining. The United States District Court for the Western District of Pennsylvania granted partial summary judgment in favor of the plaintiff–retirees on the issue of liability and, on appeal under 28 U.S.C. § 1292(b), the Third Circuit affirmed.

In rejecting the defendant's argument that ERISA had preempted contract claims against an employer for sums in excess of those guaranteed by the PBGC, the Court construed *Nachman, supra,* as having, by negative implication affirmed the continuing vitality of direct contractual liability:

> [If *Nachman* stands for the proposition that an] employer may limit direct liability [and it does], direct liability must persist under ERISA. Otherwise *Nachman* would nonsensically permit restrictions on a form of liability the statute had precluded.

Murphy, supra, 635 F.2d at 239 (material in brackets added).

Not content to rely on *Nachman* alone, the court resorted to an examination of the statute itself to ascertain whether there was any inconsistency between the principle of direct contractual liability and the specific provisions and history of the Act. It concluded that there was no inconsistency:

> It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself. While the effect of permitting that additional recovery may reduce the employer's net worth, and thus decrease the amount the PBGC may recover from the employer, the PBGC in its amicus brief to this court has taken a position supporting the employees' right to recover directly from the employer. Because nothing in ERISA, nor in its legislative history, nor in the views expressed by the government corporation charged with administering ERISA-guaranteed pension payments discountenances direct contractual recovery of pension benefits from the employer, we will affirm the district court's grant of summary judgment of liability in favor of the employees.

Murphy, supra, 635 F.2d at 239.

Taken together, the *Ambrose* and *Murphy* decisions stand for the proposition that "direct employer liability" is "direct employer liability" regardless of the existence of an ERISA benefit plan. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

These pronouncements of the Third Circuit directly conflict with the decision below in the Fourth Circuit, which holds that attempts to enforce direct employer liability

under state law are precluded by ERISA's preemption of the state laws. Insofar as this conflict exists and will result in inconsistent application of federal law within the various circuits, this Court should exercise its authority to resolve the conflict by granting full consideration to this appeal.

CONCLUSION

For all of the foregoing reasons, this Court should summarily reverse the decision of the court below or grant plenary consideration of the significant question raised by appeal of the Commissioner of Labor of the State of North Carolina.

This the 2nd day of December, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing JURISDICTIONAL STATEMENT of the Commissioner of Labor of the State of North Carolina, Plaintiff-Intervenor-Appellant, upon:

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This the 2nd day of December, 1985.

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Assistant Attorney General

85-944

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. BROOKS,
Commissioner of Labor of the
State of North Carolina,
Appellant,

v.

BURLINGTON INDUSTRIES, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

APPENDIX

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APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 84-2241(L)

Rose M. Holland; Jean H. Stallings; Walter Burlington, Jr.; John C. Brooks, Commissioner of Labor of the State of North Carolina,
Plaintiffs,

AND

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamela B. Apple; Carole Gaggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Rose M. Holland; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonne B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara E. Petty; P. Douglas Pierce; Betty Hornaday Ray; Ruth S. Rich; Mary Darlene Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoe; Gladys H. Shore; Frances Simmons; Jean H. Stallings; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B.

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Appellants,

v.

Burlington Industries, Inc.; Calvin A. Michaels; Charles A. McLendon; and **Humberto L. Quintana,**
Appellees.

State of New York,
Amicus Curiae.

No. 84-2257

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamela B. Apple; Carole Gaggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Rose M. Holland; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonne B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara E. Petty; P. Douglas Pierce; Betty Hornaday Ray; Ruth S. Rich; Mary Darlene Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoe; Gladys H. Shore; Frances Simmons; Jean H. Stallings; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B. Young; Bettie J. Boswell; Debbie M. Rascoe; Lemmer Sherdina Sellars; Jack T. Sullivan; Claude O. Anders; Eva Barr; Margaret Brindle; Walter Burlington, Jr.; Hoyt Cheek, Sr.; Hubert Foltz; Clyde Jarrell; Robert Martin; Thelma Martin; Leslie Morehead; Gerald Moretz; Alice Nelson; Carolyn Rayfield; Daisy Rickey; Ethel Royal; Larry Wright; William K. Anders; Merilla L. Barrier; Diane L. Boehm; Henry M. Brown; Hilda K. Cox; Stephen E. Elmore, Jr.; Richard L. Hall; William Jones; Paul M. King; Robert E. May; William Robert Oman; Cecil A. Poff; John W. Quick; Clifton Smith; Mary Smith; J. Clay Stiles, III; Bobby S. Tew; Thurman A.

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Plaintiffs,

AND

John C. Brooks, Commissioner of Labor of the State of North Carolina,
Appellant,

v.

Burlington Industries, Inc.; Calvin A. Michaels; Charles A. McLendon; and **Humberto L. Quintana,**
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO. RICHARD C. ERWIN, District Judge. (C/A 83-274-G).

Argued: May 7, 1985 Decided: September 3, 1985

Before **HALL** and **WILKINSON**, Circuit Judges, and **BUTZNER**, Senior Circuit Judge.

Marion G. Follin, III; Tiare B. Smiley, Assistant Attorney General (Michael K. Curtis; Smith, Patterson, Follin, Curtis, James & Harkavy; Lacy H. Thornburg, Attorney General; John C. Brooks, Commissioner of Labor; Thomas A. Harris, Director, Wage and Hour Division, on brief) for *Appellants/Intervenor*; McNeill Smith (Ben F. Tennille; Smith, Moore, Smith, Schell & Hunter on brief) for *Appellee*; (Robert Hermann, Solicitor General; O. Peter Sherwood, Deputy Solicitor General; Carlin Meyer, Assistant Attorney General; Jane Lauer Barker, Assistant Attorney General; Andrew Schultz, Assistant Attorney General; Robert Abrams, Attorney General, on brief) for *Amicus Curiae.*

WILKINSON, Circuit Judge:

Former employees of Burlington Industries, Inc. Socks and Hosiery Divisions brought suit seeking to recover severance pay allegedly due upon Bulington's sale of the divisions to Kayser-Roth Corporation. The court below granted summary judgment for defendant after finding that the severance pay policy at issue was subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, that ERISA preempted state law, and that Burlington's decision to deny severance pay was neither arbitrary or capricious. Finding no error in these holdings, we affirm.

I.

The 200 appellants were employees of Burlington's Socks and Hosiery Divisions on January 3, 1982, when Burlington sold the divisions to Kayser-Roth as going concerns. Pursuant to agreement with Burlington, Kayser-Roth offered employment to virtually all employees of these divisions, including appellants, who continued to work without interruption. The five employees not offered employment with Kayser-Roth received severance pay under the plan described below, and Burlington agreed to provide severance pay to any employee terminated by Kayser-Roth within six months of the transfer of ownership.

Burlington has maintained a severance pay plan for salaried employees since at least 1953. At the relevant time, the terms of the plan appeared in the company's Policy Manual, available to employees on request, and in the Salaried Employees' Handbook. The Handbook described the plan in general terms, providing that two weeks' to twelve months' severance pay would be available to "full time employees who involuntarily leave the

company."[1] The Policy Manual discussed the plan in more detail. In addition to setting out payment schedules for severance pay based on an employee's age and length of service, the Manual established eligibility requirements for severance pay. The most relevant requirement was that of "job termination," said to include "terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes."[2]

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[1]The complete text of the Handbook provision stated:

SEVERANCE PAY.

The Company provides severance pay to full-time employees who involuntarily leave the Company. Pay ranges from two weeks to twelve months, based on the employee's age and length of continuous service with the Company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits.

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[2]Relevant portions of the Manual provided:

I. *Company Policy*

A. *General*—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. *Payments*—Payroll severance payments are based upon tables contained in this policy . . . .

II. *Application of Policy*

A. *Payroll Severance*—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance.

1. *Eligibility*—Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:

a. *Job Elimination*—This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

Appellants sought severance pay under this plan when Burlington sold the divisions to Kayser-Roth, asserting that they were entitled to the pay because their jobs with Burlington were terminated, and that their immediate re-employment by Kayser-Roth was irrelevant under the plan. Burlington denied that it owed severance pay, contending that there had been no "job elimination" as required by the Policy Manual.

Appellants initially sought redress in North Carolina state court, relying on common law claims of breach of contract and estoppel and several state statutes, including the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.7. The action was removed to federal court on Burlington's petition that the claims arose under ERISA. The plaintiffs amended their complaint to assert further claims based on ERISA. The Commissioner of Labor of the State of North Carolina ("Commissioner") intervened.

On appeal, the Commissioner primarily argues that the severance pay plan is not covered by ERISA, and that ERISA does not preempt state law. On this score, he is joined by officials from ten states and the District of Columbia as *amici curiae*. The 200 individual appellants contend that the denial of severance pay violated ERISA.[3]

II.

The Commissioner, joined by *amici*, asserts that ERISA simply does not apply to Burlington's severance pay policy, and that such a plan is therefore governed solely by state law. We reject this contention, and hold that Burlington's severance pay plan falls within the provisions

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[3]An action arising out of these same facts was filed in the Southern District of New York. The Second Circuit recently affirmed the district court's findings that the plan was within ERISA and that state law was preempted. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985). The case was remanded for consideration of whether the denial of severance pay was arbitrary and capricious.

of ERISA as an "employee welfare benefit plan." Moreover, ERISA governs employer severance pay plans whether funded from general assets, as here, or from a special trust.

Congress enacted this complex legislation to federalize much of employee pension and benefit law. It characterized plans covered by ERISA as either "employee pension benefit plans," 29 U.S.C. § 1002(2) or "employee welfare benefit plans," 29 U.S.C. § 1002(1), both of which must comply with ERISA's reporting and disclosure requirements, 29 U.S.C. §§ 1021–1031, and its fiduciary standards for management of plan assets, 29 U.S.C. §§ 1101–1114. The former are subject to more stringent requirements than the latter, including the statute's vesting and funding requirements, 29 U.S.C. §§ 1053, 1082. None of the parties contends that the severance pay provision qualifies as an employee pension benefit plan. Rather, the issue is whether it constitutes an employee welfare benefit plan or a mere "payroll practice"—as defined by Department of Labor regulations, 29 C.F.R. § 2510.3-1—that falls outside the scope of ERISA.

The statutory language supports the designation of severance pay as an employee welfare benefit plan. Such plans, as defined in § 3(1) of ERISA, 29 U.S.C. § 1002(1), include:

> [A]ny plan, fund or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment . . . or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Subsection (A) above refers to "benefits in the event of . . . unemployment." The evidence in this case suggests that at least one purpose of the Burlington plan is to provide help for employees during periods of unemployment that follow

the elimination of their jobs. This view of severance pay brings it within the definition of employee welfare benefit plan in § 1002(1)(A) and thus within the ambit of ERISA. *See Gilbert*, 765 F.2d at 325; *Jung v. FMC Corp.*, 755 F.2d 708, 710 n.2 (9th Cir. 1985); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357, 1361 (D. N.J. 1982) ("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an 'unemployment' benefit.")

Severance pay plans are also within the definition of 29 U.S.C. § 1002(1)(B), which refers to 29 U.S.C. § 186(c) for illustration of the types of benefits characterized as employee welfare benefit plans. Section 186(c)(6) describes "pooled vacation, holiday, *severance* or similar benefits" (emphasis added), and thereby brings such benefits within the meaning of employee welfare benefit plans. Other courts considering the issue have reached the same conclusion. *See e.g., Gilbert*, 765 F.2d at 325-26; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357, 1361-62 (D. N.J. 1982); Dependahl v. Falstaff Brewing Corp., 491 F. Supp. 1188, 1196 (E.D. Mo. 1980), aff'd, 653 F.2d 1208 (8th Cir.); *cert. denied*, 454 U.S. 968, *sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981); *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361, 362-63 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980).

Department of Labor regulations promulgated under ERISA reinforce the conclusion that the effect of the reference to § 186(c) "is to include within the definition of 'welfare plan' those plans which provide holiday and *severance benefits* and benefits which are similar." 29 C.F.R. § 2510.3-1(a)(3) (emphasis added). The Commissioner's contention that the Secretary of Labor lacks authority to interpret the statute in this manner has been definitively answered by Congress through subsequent amendment to the statute. In 1980, Congress added the language found at 29 U.S.C. § 1002(2)(B): "The Secretary may by regula-

tion prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which — (1) severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." This amendment, adopted after the Secretary of Labor had promulgated the regulations, effectively sanctioned these regulations by statute and provided that severance pay arrangements, whether treated as pension plans or welfare plans, would be subject to the Act.

We also reject the Commissioner's contention that Burlington's severance pay plan is not within ERISA because it is not specially funded. He argues that § 186(c)(6) includes only funded plans because that section concerns money paid to a "trust fund" established for the purpose of "*pooled* vacation, holiday, severance or similar benefits." 29 U.S.C. § 186(c) (emphasis added). The Department of Labor regulations interpreting the reference to § 186(c), however, contain no limitation on the form of severance pay plans; the reference is to types of benefits that are to be covered by ERISA, whether in the form of trust funds or not. *Scott,* 754 F.2d at 1502. This is a reasonable interpretation of the statute, and one in which Congress has concurred by its 1980 amendments. The Second Circuit has also concluded that the interpretation reflected in the regulation is supported by the legislative history of the original enactment of ERISA. *See Gilbert,* 765 F.2d at 326.

The Commissioner further argues that the severance pay plan in this case is a "payroll practice" and not an employee welfare benefit plan according to the Department of Labor's own regulations. 29 C.F.R. § 2510.3-1(b) defines payroll practice to include payments out of an employer's general assets of compensation on account of work performed (including overtime pay, shift, premiums, holiday premiums, and weekend premiums), *id.* § 2510.3-1(b)(1), or for periods of absence due to medical

or psychiatric reasons, *id.* § 2510.3-1(b)(2), vacation, holiday, military duty, jury duty, training, or sabbatical leave. *id.* § 2510.3-1(b)(3). Here the Commissioner's argument is refuted by omission. The regulations simply do not include severance pay as a payroll practice and, in light of the authority described above, we see no reason to disturb the Secretary's categorization of severance pay as an employee welfare benefit plan. Payroll practices refer to general asset compensation during employment; severance pay, by contrast, occurs after termination of employment. *Scott*, 754 F.2d at 1503. The *Scott* court reasoned soundly that the greater "danger of default" on large and unanticipated severance obligations argued also for coverage under ERISA.

Though a major purpose of ERISA was to aid employees' knowledge and receipt of benefits, employees may, as here, urge that a paticular policy is *not* within ERISA so that claims may be heard before state courts or questions of federal preemption of state statutes may be avoided. These desires, however understandable, do not give us license to avoid the scheme established by Congress. As detailed above, Congress determined as a matter of policy that severance pay benefits should be subject to ERISA. It mandated that severance pay plans be subject to the reporting and disclosure requirements of ERISA, 29 U.S.C. §§ 1021-1031, so that employees would be aware of their benefits and better able to pursue them. The fact that employees may sometimes wish to forego these advantages of ERISA coverage in favor of arguably more generous state statutes does not allow us to escape the clear direction of Congress.

III.

The district court concluded that ERISA's regulation of severance pay preempted state regulation of the matter. The Commissioner urges us to reverse this holding, arguing instead that ERISA and state statutes such as the

North Carolina Wage and Hour Act should coexist and independently monitor severance pay plans. We do not agree and hold that ERISA preempts the state law claims asserted in this case.

When considering preemption of state law, "our task is to ascertain Congress' intent in enacting the federal the federal statute at issue." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). In ERISA, Congress made its intent known in what has been called "the most sweeping federal preemption statute ever enacted by Congress." *California Hospital Association v. Henning*, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983). 29 U.S.C. § 1144(a) preempts, with certain exceptions not relevant here,[4] "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.

In *Shaw*, 463 U.S. at 96–97, the Supreme Court held that this language must be given broad effect: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." The Court had previously noted that "[t]he only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope." *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 523 n.20 (1981). "The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. *Metropolitan Life Insurance Co. v. Massachusetts*, ____ U.S. ____, 105 S. Ct. 2380, 2389 (1985).

A broad reading of the phrase "relates to" is consistent with the legislative history and policies behind ERISA.

[4]The exceptions allow continued operation of state insurance, banking, and securities laws, 29 U.S.C. § 1144(b)(2)(A), within limits defined by the statute, 29 U.S.C. § 1144(b)(2)(B), (b)(6), and generally applicable criminal laws, 29 U.S.C. § 1144(b)(4). The Commissioner does not assert any of these exceptions to ERISA's preemption.

Congress rejected a narrower preemption provision, that would have preempted only state laws dealing directly with ERISA plans. *See Shaw*, 463 U.S. at 98–100. Instead, "Congress legislated an ouster of all state laws relating to employee benefit plans." *Dependahl*, 653 F.2d at 1215. This broad preemption furthers a major policy objective of ERISA—*uniformity* in employee benefit laws. Congress realized that various state regulations of employee benefit plans had become a major concern to employers with plants, divisions, or employees scattered in numerous states, and a broad preemption provision was an integral part of ERISA's response to that concern. *See Shaw*, 463 U.S. at 99.

Given the unparalleled breadth of ERISA's preemption provision, we have no trouble concluding that the state actions at issue are preempted. The state law here essentially requires employers to pay wages due upon termination of employment, N.C. Gen. Stat. § 95-25.7. Insofar as this statute is invoked in pursuit of benefits allegedly due under Burlington's severance pay plan, it "relates to" an employee benefit plan covered by ERISA. Preemption applies to a state cause of action under common law as well, for the state breach of contract and estoppel claims pose the same potential as the statutory cause of action for conflicting employer obligations and variable standards of recovery.[5] As in *Gilbert*, "the state law claims . . .

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[5]"ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Instead, Congress intended for the courts, borrowing state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal common law to govern ERISA suits." *Scott*, 754 F.2d at 1501–02 (citing cases).

Any hope of uniformity in employer obligations would be lost were we to allow various states' common law governing these obligations to coexist with federal common law under ERISA. Under such a scheme, employers would not only be faced with dual requirements within a single state, but with different state requirements wherever they do business. ERISA surely contemplates a different result.

would determine whether any benefits are paid, and directly affect the administration of benefits under the plan." 765 F.2d at 327. ERISA and the policies underlying it require preemption.

The Commissioner attempts to escape this conclusion by invoking ERISA's definition of "state." ERISA, 29 U.S.C. § 1144(c)(2), defines state to include "a state [and] any political subdivisions thereof . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." The Commissioner asserts that North Carolina does not, in fact, regulate the "terms and conditions" of the plan, and therefore its statute is not "state" law for preemption purposes. Given the explicitly broad nature of ERISA preemption, we are not inclined to limit ERISA's coverage through a restrictive reading of this term. Even under a narrow interpretation, however, laws that, if given effect, would govern the very availability of benefits for particular individuals clearly regulate the "terms and conditions" of the plan. *See Authier v. Ginsberg,* 757 F.2d 796, 799, n.4 (6th Cir. 1985).[6]

IV.

Having concluded that ERISA governs the issues presented in this case, we must now determine whether Burlington properly denied the claims for severance pay presented by the individual appellants. In reviewing de-

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[6]We reject the Commissioner's argument for a Tenth Amendment exemption from ERISA's preemption, *see Garcia v. San Antonio Metropolitan Transit Authority,* ____ U.S. ____, 105 S. Ct. 1005 (1985), or an exception based on the state's police power, effectively rejected in *Gilbert,* 765 F.2d at 327.

We further reject the appellant's reliance on *Livernois v. Warner Lambert Co., Inc.,* 723 F.2d 1148 (4th Cir. 1983). There the court resolved severance pay issues on state law grounds and noted that cases arising under ERISA were not pertinent and presented a different question. 723 F.2d at 1152-3, n.6.

terminations of claim eligibility under ERISA, we employ an "arbitrary and capricious" standard. *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *LeFebre v. Westinghouse Electric Corp.*, 747 F.2d 197 (4th Cir. 1984). *See also, Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984); *Moore v. Reynolds Metals Company Retirement Program for Salaried Employees*, 740 F.2d 454, 457 (6th Cir. 1984); *Berg v. Board of Trustees, Local 705 International Brotherhood of Teamsters Health and Welfare Fund*, 725 F.2d 68, 70 (7th Cir. 1984); *Short v. Central States, Southeast and Southwest Areas Pension Fund*, 729 F.2d 567, 571 (8th Cir. 1984). We hold that the denial of severance benefits to the appellants was not arbitrary and capricious in this case.

A.

We see no reason to deviate from this circuit's "arbitrary and capricious" standard of review, despite the appellants' request that we do so. Appellants argue that the arbitrary and capricious standard should apply only where a formal trust fund is involved. Though many cases applying this standard to eligibility disputes do involve trusts, there is no reason to apply a different standard here. Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with administrators "whose experience is daily and continual, not with judges whose exposure is episodic and occasional," *Berry*, 761 F.2d at 1006. This objective holds true whenever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue. Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary and capricious manner, must remain with those who formulate and administer company plans and policies, whether formally trustees or not. *Accord, Jung*, 755 F.2d at 710–12; *Sly v. P. R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983). To vary the standard of judicial review for general asset welfare plans would only sow confusion in ERISA, which we decline to do.

Appellants next urge that we apply here the more stringent fiduciary standards normally reserved for review of trustees' management of trust assets. *See Struble v. New Jersey Employee Welfare Trust Fund,* 732 F.2d 325 (3d Cir. 1984). In *Struble,* plaintiffs challenged the trustees' decision to reduce employer payments into an overfunded plan rather than to increase the level of benefits. The court applied strict fiduciary standards because "the gravamen of the . . . complaint is not that the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries." *Id.* at 333-34. In *Struble,* those affected by the trustees' action included *all* potential beneficiaries of the plan. Here, by contrast, one group among the many potential beneficiaries of a company plan dispute the denial of their claims, and the issue is not, as in *Struble,* whether the trustees "have sacrificed the interests of *the beneficiaries as a class* in favor of some third party's interests." *Id.* at 333 (emphasis added). *Struble* involved in essence a fund management dispute, to which strict standards normally apply, rather than a question of claim eligibility, as here. *See also, Jung,* 755 F.2d at 711 (distinguishing *Struble*).

Finally, appellants argue that special circumstances may justify a less deferential application of the arbitrary and capricious standard than would normally obtain. In *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1353 (9th Cir. 1984), the court intimated that a more stringent review might be warranted "when ERISA's provisions have been flaunted in . . . a wholesale and flagrant manner." The evidence showed that the plan was "actively concealed" from employees, *id.* at 1352, and that the employer had failed to meet any of ERISA's procedural requirements. Accordingly, the court, though still applying the arbitrary and capricious standard, reviewed the actions in light of the "continuing procedural violations." *Id.* at 1354.

We have underscored in this circuit the application of

a single standard of review to questions of claim eligibility. *See Berry*, 761 F.2d at 1006; *LeFebre*, 747 F.2d at 204, *Horn v. Mullins*, 650 F.2d 35, 37 (4th Cir. 1981). We see no reason to vary the standard based on procedural violations indicating bad faith, for such situations can be adequately resolved under the traditional standard. Where procedural violations evidence a "wholesale and flagrant" flouting of ERISA, the actions of administrators will not be insulated from a finding of arbitrariness. We would approach the question, however, within the framework of the single, uniform standard to be applied to all claim eligibility disputes.

B.

Applying this standard to the facts before us, we find nothing arbitrary and capricious in Burlington's denial of severance pay. "Where the language used by the employer in holding out the plan is open to a construction supporting denial of a claim, the court should see whether the choice of that construction is arbitrary and capricious." *Jung*, 755 F.2d at 711. Here, Burlington determined that there was no "job elimination" as required by the plan because appellants had remained continuously employed in the same jobs they held before the transfer of ownership. This construction, though not compelled by the plan's language, is certainly a reasonable one, especially when viewed in light of the goals of the plan.

Burlington presented evidence that the plan was primarily intended for employees who suffered a period of unemployment when they were involuntarily terminated from their jobs. Appellants argue that this purpose is refuted by the fact that the benefits did not end when a former employee found new work; this feature, they allege, shows that the plan was not a form of unemployment compensation but was instead a type of accumulated compensation for past services. This feature of the plan, however, could just as easily be attributed to the admin-

istrative convenience of avoiding the need to monitor former employees' status for up to twelve months. In any case, unemployment compensation was undoubtedly a major purpose of the plan. *See Jung*, 755 F.2d at 713; *Sly*, 712 F.2d at 1211.

Given this purpose, we find that Burlington's interpretation of the plan was reasonable. Though it is true that the appellants stopped working for Burlington and started working for Kayser-Roth, this change in employer could reasonably be said to fall outside the scope of "job elimination." The appellants never missed a day of work due to the transfer, and most continued in their same jobs without interruption. There was no time during which they were forced to go without income due to the sale of the divisions. Employees who were not hired by Kayser-Roth received severance pay in due course. Under these circumstances, the denial of severance pay benefits to the appellants was not arbitrary and capricious but was in fact a perfectly reasonable interpretation of Burlington's severance pay policy which courts may not replace with an interpretation of their own. *LeFebre*, 747 F.2d at 204-05.

Moreover, the facts of this case do not suggest a "wholesale and flagrant" flouting of ERISA procedures that would indeed evidence bad faith and arbitrary behavior on an employer's part. Whatever violations may have occurred do not approach the level of those in *Blau*. There, for example, the plan was actively concealed from the employees; here, a general statement of policy was given to every employee and a detailed description was available upon request. Moreover, the employer in *Blau* never informed employees of its decision to deny severance pay. By contrast, Burlington promptly informed appellants that severance pay was not available under its policy. In this context, we are unable to conclude that procedural violations indicate bad faith so as to render the decisions of Burlington arbitrary and capricious.

V.

We affirm finally the decision of the court below not to award injunctive relief against Burlington. Appellants alleged that Burlington discriminated against them for pursuit of legal remedies by refusing to consider them for reemployment. ERISA, 29 U.S.C. § 1140, prohibits such behavior, and appellants sought injunctive relief against the practice. Though there is evidence that Burlington refused to consider appellants for reemployment for several months, no one was affected by this policy while it was in force. Moreover, a corporate directive was subsequently issued to forbid such behavior, and three plaintiffs were in fact reemployed by Burlington. Given these facts, we find that the court below did not abuse its discretion in denying appellants' request for injunctive relief.

VI.

We have considered the contentions of appellants and find that they were properly resolved by the district court. The judgment of that court is, accordingly,

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Greensboro Division

C-83-274-G

BILL N. SLACK, *et al.*,
Plaintiffs,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

ERWIN, District Judge:

This cause came on for hearing on August 27, 1984 at the United States Courthouse in Greensboro upon motions filed by all parties in the case. Plaintiffs are 202 former employees of defendant Burlington Industries, Inc. (Burlington), Sock and Hosiery Divisions. The case centers on whether plaintiffs are entitled to benefits under a severance pay policy in effect at the time defendant Burlington sold its Sock and Hosiery Divisions to Kayser-Roth Corporation in 1982 as ongoing concerns. After defendant Burlington refused to pay any benefits under the severance policy to its former employees who now work for Kayser-Roth, plaintiffs filed an action in state court alleging five grounds for relief. All five grounds are based on state statutory and common law. The first ground alleges common law breach of contract. The second ground alleges violation of N.C. Gen. Stat. § 95-25.7, which requires employers to pay employees all wages due at the time of termination of employment. The third ground is based on the theory of equitable estoppel. The fourth ground is based on the contract theory

of reliance. The fifth ground alleges violation of N.C. Gen. Stat. § 75-1.1, which prohibits unfair or deceptive trade practices.

Thereafter, defendant Burlington petitioned for removal of the action to federal court, asserting that the severance pay policy is an employee benefit plan subject to the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Without prejudging in any fashion the merits of the intervenor complaint, this court allowed the North Carolina Commissioner of Labor to intervene in the federal action.

In federal court, plaintiffs filed a motion for preliminary injunction to enjoin defendant Burlington from refusing to consider any of the plaintiffs for re-employment with Burlington so long as they were plaintiffs in the present action. Plaintiffs were then granted leave to file an amended complaint which added three new defendants, all executives of defendant Burlington, and which alleged three additional grounds for relief. The three grounds for relief are based on federal statutory law. The sixth ground for relief alleges that plaintiffs are entitled to benefits under the severance pay policy pursuant to 29 U.S.C. § 1132(a)(1)(B). The seventh ground alleges that defendant's refusal to consider any of the plaintiffs for re-employment constituted discrimination in violation of 29 U.S.C. § 1140. The eighth ground alleges that the three new defendants breached their fiduciary duty with respect to the severance pay policy as defined in 29 U.S.C. § 1104(a)(1).

Defendant Burlington then filed a motion for summary judgment pursuant to Rule 56, F. R. Civ. P., against plaintiffs and plaintiff-intervenor with supporting brief, affidavits, and depositions. Thereafter, plaintiffs filed a motion for partial summary judgment on the three claims based on ERISA pursuant to Rule 56, F. R. Civ. P., with supporting brief, affidavits, and depositions. Additionally, plaintiff-intervenor filed a motion to dismiss for lack of

federal jurisdiction, alleging that Burlington's severance pay policy is not governed by ERISA.

Plaintiff-Intervenor's Motion to Dismiss

In its motion to dismiss, plaintiff-intervenor contends that defendant Burlington's severance pay policy is not governed by ERISA; therefore, there is no basis for federal jurisdiction. Furthermore, plaintiff-intervenor asserts that defendant Burlington failed to allege any alternate grounds for federal jurisdiction and moves for a remand of this action to the state courts. The issue before the court is whether defendant Burlington's severance pay policy is governed by ERISA. The thrust of plaintiff-intervenor's argument is that defendant's severance pay policy is a payfoll practice policy subject to the North Carolina Wage and Hour Act rather than an employee welfare benefit plan subject to ERISA. In support of its argument, plaintiff-intervenor contends that:

1. Defendant's severance pay policy does not satisfy the required statutory scheme because it is funded from Burlington's general assets and does not have a separate entity from defendant;

2. The Department of Labor has exceeded its authority where it appears to expand the definition of employee welfare benefit plans to include all severance pay arrangements, even where they are not set as jointly administered trust funds; and

3. Defendant has failed to comply with ERISA's formal requirements regarding an employee benefit plan and should be estopped from using ERISA as a shield to avoid liability under the North Carolina Wage and Hour Act.

All of these contentions are without merit. First, both the statute and case law include severance pay arrangements within the definition of employee welfare benefit plans for purpose of ERISA coverage. Title 29 of the United States Code, Section 1002(2)(B), states: "The Secretary

may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which . . . severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." The Secretary has promulgated such a rule which treats a severance pay plan as an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(a)(3) (1983). Additionally, the courts have consistently held that severance pay plans were employee welfare benefit plans under ERISA. *See Sly v. P. R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983); *Dhayer v. Weirton Steel Division of National Steel Corp.*, 571 F. Supp. 316 (N.D. W.Va. 1983); *Donnelly v. Aetna Life Ins. Co.*, 465 F. Supp. 696, 698 (E.D. Pa. 1979); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D. N.J. 1982); *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361, 362-63 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981).

Secondly, there is no case law to support the proposition that severance pay arrangements must be funded from trust assets separate from the employer's general assets or that the arrangement must exist as a separate entity. As the court in *Dhayer v. Weirton Steel Division of National Steel Corp., supra*, at 330, noted: "Indeed, the funding requirements of ERISA do not apply to employee welfare benefits plans such as a severance pay benefit, 29 U.S.C. § 1081, and there is no 'fund' or group of assets subject to the prohibited transaction provisions."

Lastly, plaintiff-intervenor's equitable estoppel argument does violence to the purpose of ERISA. The court in *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982), aptly observed:

> [B]ecause the policy of ERISA is to safeguard the well-being and security of working men and

> women and to apprise them of their rights and obligations under any employee benefit plan . . . it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards.

Therefore, the court finds that defendant Burlington's severance pay policy is governed by ERISA, and the court has jurisdiction of this case. Accordingly, plaintiff-intervenor's motion to dismiss must be denied.

Defendant Burlington's Motion for for Summary Judgment

In its motion for summary judgment, defendant Burlington contends that plaintiffs and plaintiff-intervenor's claims based upon state laws are preempted by federal law and that defendant should prevail as a matter of law on the remaining claims based on ERISA. The court will first address the effect of preemption on the state law claims asserted by plaintiffs and plaintiff-intervenor.

Federal Preemption of State Law Claims Under ERISA

The Employment Retirement Income Security Act of 1974 regulates employee fringe benefit plans. ERISA provides for preemption of state law in 29 U.S.C. § 1144(a) as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not

> exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Although specific kinds of state laws are exempt from preemption under this statute, *see* 29 U.S.C. § 1144(b)(2)(A), the effect of the preemption provision is quite broad. Relying on the legislative history of the statute as well as the statute's plain language, the Supreme Court in *Shaw v. Delta Air Lines, Inc.*, ____ U.S. ____, 51 U.S.L.W. 4968 (June 24, 1983), held that 29 U.S.C. § 1144(a) could not be interpreted to preempt only state laws dealing with specific subject matters covered by ERISA but preempted state laws that "relate to any employee benefit plan" within the meaning of the statute. Thus, it is clear that state laws (including all laws, decisions, rules, regulations, or other state action having the effect of law) are preempted by ERISA if they "relate to" employee benefit plans not exempted by the statute.

In his complaint, plaintiff-intervenor alleges that the defendant Burlington is liable to the individual plaintiffs for severance pay pursuant to the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1 *et seq.* Wages are defined by the Act as specifically including severance pay. N.C. Gen. Stat. § 95-25.2(16). The Act also allows either employees or the Commissioner of Labor to bring a civil action to recover unpaid wages and provides for exemplary damages and injunctive relief.

The court has held that Burlington's severance pay plan is an employee benefit plan subject to ERISA. Inasmuch as the North Carolina Wage and Hour Act defines severance pay as wages, the state statute "relates to" the severance pay plan of Burlington. Accordingly, plaintiff-intervenor's claims under the Act are preempted by ERISA. Therefore, the court must grant defendant's motion for summary judgment as to the claims asserted by the plaintiff-intervenor.

Plaintiffs' second claim for relief is also brought pursuant

to the North Carolina Wage and Hour Act. For the reasons stated above, the court must grant defendant's motion for summary judgment with respect to plaintiffs' second claim for relief.

In their first, third, and fourth claims for relief, plaintiffs allege they are entitled to recover severance pay based on common law contract and estoppel theories. These common law claims "relate to" defendant Burlington's severance pay plan and are preempted by ERISA under 29 U.S.C. § 1144(a). Therefore, the defendant Burlington's motion for summary judgment as to plaintiffs' first, third, and fourth claims must be granted.

Plaintiffs' fifth claim based on the North Carolina Unfair Competition Act, N.C. Gen. Stat. § 75–1.1 must be dismissed because the provisions of the Act do not apply to employer–employee relationships. *Buie v. Daniel Intern Corp.*, 56 N.C. App. 445, 289 S.E.2d 118 (1982). Therefore, defendant's motion for summary judgment with respect to plaintiffs' fifth claim must be granted.

Claims Based upon ERISA

A careful review of the record indicates that there is no genuine issue of material fact and that defendants are entitled to judgment in their favor as a matter of law on the remaining claims based upon ERISA. The standard of review of a claim decision made by a plan administrator is whether the administrator's decision was arbitrary or capricious. *Horn v. Mullins*, 650 F.2d 35 (4th Cir. 1981). This standard of review is applied whether the "plan" is an employee pension plan or, as here, an employee welfare benefit plan providing for severance pay. *Sly v. P. R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983). Thus, the court must determine whether there is substantial evidence to support defendants' decision to deny severance pay to plaintiffs.

Plaintiffs contend that the governing document in this

case is the Salaried Employees Handbook. The handbook contains highlights of Burlington's benefit plans. The handbook is distributed to all salaried employees of Burlington and contains a description of the defendant Burlington's severance pay plan. The court finds, however, that the governing document for the administration of the severance pay plan is the Company Policy Manual rather than the Salaried Employees Handbook. The Policy Manual contains a compilation of formal policy statements. Although the salaried employees were not provided with a copy of the policy manual, the employees did have access to it.

The Policy Manual contained a section dealing with severance pay as early as June 1953. The provisions of that section were revised on various occasions during the relevant period. A 1974 revision provided that "job elimination" was a condition of eligibility for severance pay. The language in effect at the time of the sale of the Sock and Hosiery Divisions to Kayser-Roth provided in pertinent part:

> 1. *Eligibility* — Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:
>
> a. *Job Elimination* — This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

Plaintiffs argue that "job elimination" applies to involuntary terminations of employees when their jobs are eliminated with defendant, irregardless of the availability of employment elsewhere. Defendants, on the other hand, argue that the words, "job elimination" refer to the elimination of jobs as such and that when jobs are preserved as a result of an organizational change, the mere loss of em-

ployment at Burlington does not trigger eligibility for severance pay. The court finds that defendants' interpretation of its plan is rational in view of the plain language of the plan, the purpose of the plan, and defendants' past practices in relation to the severance pay plan.

Burlington established its severance policy for the purpose of providing financial support to employees whose jobs are lost through no willful fault of their own and who might therefore be in need of financial resources during a period of unemployment. It is evident that since the inception of Burlington's present severance policy in 1974, defendants have consistently applied that policy in the context of plant and division sales to bar severance pay to employees who continue in their jobs under new management. The court notes that a payment to Fleet Services employees who were terminated by Burlington but who continued working with new employers was a special cash award rather than severance pay. The court finds that defendants' decision to deny plaintiffs severance pay benefits was supported by substantial evidence on the record and was not arbitrary or capricious.

In their seventh claim for relief, plaintiffs allege that defendants have discriminated against them by refusing to consider plaintiffs for re-employment with Burlington because they filed this lawsuit. Plaintiffs seek injunctive relief. Title 29 of the United States Code, Section 1140, prohibits discrimination against a participant for exercising any right to which he is entitled under ERISA or under the employee benefit plan or for the purpose of interfering with the attainment of any right to which the participant may become entitled under the plan.

The court finds that plaintiffs' seventh claim is moot. Although the deposition of Burlington's director of personnel reveals that defendants adopted a policy after this action was filed of refusing to consider the plaintiffs for for re-employment, this policy was subsequently revoked. Quintana's Affidavit. There is no evidence that at the

present time, plaintiffs who seek re-employment with Burlington are being denied consideration. Therefore, the court finds that injunctive relief is inappropriate.

Plaintiffs' eighth and final claim for relief alleges that Burlington and three employees of Burlington who hold management responsibility for the personnel policies of Burlington breached fiduciary duties owed to plaintiffs under ERISA. This claim is without merit. As the court noted previously, defendants' decision to deny plaintiffs severance pay is supported by substantial evidence on the record and was not arbitrary or capricious. Therefore, the court finds that defendants discharged their duties in administering the severance pay plan with diligence and prudence in accordance with the documents governing the plan. 29 U.S.C. § 1104(a)(1).

For the foregoing reasons, IT IS ORDERED, ADJUDGED, AND DECREED that defendants' motion for summary judgment is hereby **DENIED**; and that plaintiff intervenor's motion to dismiss is hereby **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for preliminary injunction is hereby **DENIED**. A judgment will be entered contemporaneously with this Memorandum Opinion dismissing this action with prejudice as to the defendants.

/s/ Richard Erwin
United States District Judge

October 17, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Greensboro Division

C-83-274-G

BILL N. SLACK, *et al.*,
Plaintiffs,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT

For the reasons stated in a Memorandum Opinion filed contemporaneously herewith, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion for summary judgment be granted; that plaintiffs' motion for partial summary judgment be denied; and that plaintiff-intervenor's motion to dismiss be denied.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for preliminary injunction be denied. This action is dismissed with prejudice, and all parties are to bear their own costs.

/s/ Richard Erwin
United States District Judge

October 17, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1985 Term

84-2241(L)
84-2257

BILL N. SLACK, *et al.*,
Plaintiffs-Appellants,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

JOHN C. BROOKS,
Commissioner of Labor of the
State of North Carolina,
Plaintiff-Intervenor-Appellant,

v.

BURLINGTON INDUSTRIES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given pursuant to Rule 10 of the Rules of the Supreme Court of the United States that John C. Brooks, Commissioner of Labor of the State of North Carolina, as plaintiff-intervenor-appellant, hereby appeals to the Supreme Court of the United States under 28 U.S.C. § 1254(2) from the judgment of this Court entered September 3, 1985.

This the 15th day of October, 1985.

LACY H. THORNBURG
North Carolina Attorney General

/s/ TIARE B. SMILEY
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
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Attorneys for
Plaintiff-Intervenor-Appellant

APPENDIX E

Relevant Statutes and Regulations

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.*

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a larger volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated

retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits: and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

* * *

§ 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purposes of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its

express terms or as a result of surrounding circumstances such plan, fund, or program —

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which —

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an

employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may be come entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(1) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act (sections 1331 to 1343 of Title 43).

* * *

(14) The term "party in interest" means, as to an employee benefit plan —

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of —

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

* * *

(16) (A) The term "administrator" means —

(i) person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may be regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained —

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * *

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information

described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 USCS § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 USCS § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 USCS § 1024(a)(1)(D)].

(b) The plan description and the summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the

procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

§ 1023. Annual reports

(a) Publication and Filing. (1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a) [29 USCS § 1024(a)], and shall be made available and furnished to participants in accordance with section 104(b) [29 USCS § 1024(b)].

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

§ 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary. (1) The administrator of any employee benefit plan subject to this part shall file with the Secretary —

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description with 120 days after such plan becomes subject to this part and an updated plan description, not more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 102(a)(2) [29 USCS § 1022(a)(2)] within 60 days after such modification or change is adopted or occurs, as the case may be.

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 102(a)(1) [29 USCS § 1022(a)(1)] —

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

* * *

Participating and Vesting

§ 1031. Coverage

This part [29 USCS §§ 1051 et seq.] shall apply to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] (and not exempted under section 4(b) [29 USCS § 1003(b)]) other than —

(1) an employee welfare benefit plan;

* * *

Funding

§ 1081. Coverage

(a) This part [29 USCS §§ 1081 et seq.] shall apply to any employee pension benefit plan described in section 4(a) [29 USCS § 1003(a)], (and not exempted under section 4(b) [29 USCS § 1003(b)]), other than —

(1) an employee welfare benefit plan;

* * *

§ 1082. Minimum funding standards

(a) Avoidance of accumulated funding deficiency. (1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305 [29 USCS § 1085]) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

* * *

§ 1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan. Every employee benefit plan shall —

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)]),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * *

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest. Except as provided in section 4087 [29 USCS § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, if any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to , or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USCS § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USCS § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any

transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

§ 1132. Civil enforcement

(a) Persons enpowered to bring a civil action. A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other

appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

* * *

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place,

or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

* * *

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall —

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

* * *

§ 1144. Other laws

(a) Supersedure; Effective Date. Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 C.F.R.

SUBCHAPTER B — DEFINITIONS AND COVERAGE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

§ 2510.3-1 Employee welfare benefit plan

(a) *General.* (1) The purpose of this section is to clarify the definition of the terms "employee welfare benefit plan" and "welfare plan" for purposes of Title I of the Act and this chapter by identifying certain practices which do not constitute employee welfare benefit plans for those purposes. In addition, the practices listed in this section do not constitute employee pension benefit plans within the meaning of section 3(2) of the Act, and, therefore, do not constitute employee benefit plans within the meaning of section 3(3). Since under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I of the Act, the practices listed in this section are not subject to Title I.

(2) The terms "employee welfare benefit plan" and "welfare plan" are defined in section 3(1) of the Act to include plans providing "(i) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, dis-

ability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (ii) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Under this definition, only plans which provide benefits described in section 3(1)(A) of the Act or in section 302(c) of the Labor-Management Relations Act, 1947 (hereinafter "the LMRA") (other than pensions on retirement or death) constitute welfare plans. For example, a system of payroll deductions by an employer for deposit in savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of the Act because it does not provide benefits described in section 3(1)(A) of the Act or section 302(c) of the LMRA. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of the Act and, therefore, is not an employee benefit plan within the meaning of section 3(3) of the Act).

(3) Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are "***holiday, severance or similar benefits". Thus, the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).

(4) Some of the practices listed in this section as excluded from the definition of "welfare plan" or mentioned as examples of general categories of excluded practices are inserted in response to questions received by the Department of Labor and, in the Department's judgment, do not represent borderline cases under the definition in section 3(1) of the Act. Therefore, this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(1).

(b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include —

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as —

(i) Overtime pay,

(ii) Shift premiums,

(iii) Holiday premiums,

(iv) Weekend premiums;

(2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric

treatment) performs no duties; for example —

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons.

(ii) Payment of compensation to an employee who is absent while on active military duty,

(iii) Payment of compensation while an employee is absent for the purposes of serving as a juror or testifying in official proceedings,

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

* * *

§ 2510.3-2 Employee pension benefit plan

(a) *General.* This section clarifies the limits of the defined terms "employee pension benefit plan" and "pension plan" for purposes of Title I of the Act and this chapter by identifying certain specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes. To the extent that these plans, funds and programs constitute employee welfare benefit plans within the meaning of section 3(1) of the Act and § 2510.3-1 of this part, they will be covered under Title I; however, they will not be subject to parts 2 and 3 of Title I of the Act.

(b) *Severance pay plans.* (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be

deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

SELECTED PROVISIONS OF ARTICLE 2A OF CHAPTER 95, NORTH CAROLINA GENERAL STATUTES

§ 95-25.2. Definitions.

In this Article, unless the context otherwise requires:

(16) "Wage" paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities. For the purposes of G.S. 95-25.6 through G.S. 95-25-12, "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

§ 95-25.6. Wage payment.

Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance. (1975, c. 413, s. 3; 1977, c. 826, s. 3; 1979, c. 839, s. 1.)

§ 95-25.7. Payment to separated employees.

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture. (1975, c. 413, s. 4; 1979, c. 839, s. 1; 1981, c. 663, s. 1.)

§ 95-25.12. Vacation pay.

No employer is required to provide vacation for employees. However, if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss or forfeiture. (1979, c. 839, s. 1; 1981, c. 663, s. 6.)

§ 95-25.22. Recovery of unpaid wages.

(a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be.

In its discretion, the court may award exemplary damages in an amount not in excess of the amount found to be due as provided above.

(b) Action to recover such liability may be maintained in the General Court of Justice by any one or more employees.

(c) Action to recover such liability may also be maintained in the General Court of Justice by the Commissioner at the request of the employees affected. Any sums thus recovered by the Commissioner on behalf of an employee shall be held in a special deposit account and shall be paid directly to the employee or employees affected.

(d) The court, in any action brought under this section may, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant.

The court may order costs and fees of the action and reasonable attorneys' fees to be paid by the plaintiff if the court determines that the action was frivolous.

(e) The Commissioner is authorized to determine and supervise the payment of the amounts due under this section, and the agreement to accept such amounts by the employee shall constitute a waiver of the employee's right to bring an action under subsection (b) of this section.

(f) Actions under this section must be brought within two years pursuant to G.S. 1-53.

(g) Prior to initiating any action under this section, the Commissioner shall exhaust all administrative remedies, including giving the employer the opportunity to be heard on the matters at issue and giving the employer notice of the pending action. (1959, c. 475; 1975, c. 413, s. 11; 1979, c. 839, s. 1.)

§ 95-25.15. Investigations and inspection of records; notice of law.

(a) The Commissioner or his designated representative shall have the power and authority to enter any place of employment and gather such facts as are essential to determine whether or not the employer is covered by any provision of this Article.

With respect to any provision of this Article under which the employer is covered, the Commissioner or his designated representative may inspect such places and such records, make transcriptions of any and all such records, question employees and investigate such facts, conditions, practices, or matters as are necessary to determine whether the employer has violated said provision of this Article.

With respect to the provisions of G.S. 95-25.6 through 95-25.12 (Wage Payment) as those provisions apply to persons covered by the Fair Labor Standards Act, the Commis-

sioner or his designated representative shall have no authority under this subsection unless the Commissioner or his designated representative has received a complaint from an employee of the covered establishment, and then shall investigate that specific complaint only.

(b) Except as otherwise provided in this Article, every employer subject to any provision of this Article shall make, keep, and preserve such records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment which are essential to the enforcement of this Article and are prescribed by regulation of the Commissioner, except that the Commissioner shall have no authority to prescribe records for the State of North Carolina, a city, town, county or other municipality or agency or instrumentality of government.

(c) A poster summarizing the major provisions of this Artile shall be displayed in every establishment subject to Article. (1937, c. 317, ss. 5, 19; 1959, c. 475; 1971, c. 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 413, ss. 7, 9; ;1979, c. 839, s. 1.)

§ 95-25.16 Enforcement.

(a) The Commissioner shall enforce and administer the provisions of this Article, and the Commissioner or his authorized representative is empowered to hold hearings and to institute criminal and civil proceedings hereunder.

(b) The Commissioner or his authorized representative shall have power to administer oaths and examine witnesses, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and take depositions and affidavits in any proceeding hereunder. (1937, c. 317, s. 409, s. 7; 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 473, s. 9; c. 475; 1979, c. 839, s. 1.)

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No. 85-929
No. 85-944

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,
Appellant,
v.
BURLINGTON INDUSTRIES, INC., et al.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

APPELLEE'S MOTION TO DISMISS OR AFFIRM

BILL N. SLACK, et al.,
Petitioners,
v.
BURLINGTON INDUSTRIES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals and the District Court err in holding that Burlington's severance benefit policy is governed by ERISA, preempting state law?

2. Did the Court of Appeals and the District Court err in holding that Burlington was not arbitrary and capricious in not paying severance to the individual plaintiffs whose jobs were preserved - not eliminated as required by Burlington's established written policy - when its hosiery and socks divisions were sold as going concerns?

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NATURE OF THE CASE

The Commissioner's appeal concerns the scope of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq., as amended: does ERISA preempt the N.C. Wage and Hour Act, G.S. §95-25.1 et seq., which was amended January 1, 1980, to include severance pay for the first time?

The petition of the 200 salaried employees who are plaintiffs echoes the Commissioner's appeal but adds another issue: were their claims under ERISA correctly denied?

There was a full hearing in the district court on a complete record which included the depositions of each of the 200 plaintiffs, all the documents, and the testimony of defendants' officers and Director of Personnel Management who administered the company-wide severance plan. The plaintiffs declined any further

evidentiary hearing[1] and the district court held that (1) ERISA preempted state law and (2) Burlington's decision that the plaintiffs were not eligible under the terms of its plan because their jobs had not been eliminated was not arbitrary, capricious or unreasonable. The Court of Appeals affirmed.

Burlington Industries, Inc. (Burlington) sold its Socks and Hosiery Divisions to Kayser-Roth Corporation as going concerns. By agreement Kayser-Roth offered continuing employment to all but five employees. The plaintiffs accepted and continued their jobs under the new management. Employees not offered continuing employment received severance pay from Burlington according to its company-wide severance plan set forth in its Company Policy Manual to which all employees had

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[1] [Tr. of Hearing, Aug. 27, 1984, pp. 69-70].

access. Plaintiffs did not receive severance pay. Under the terms of sale their jobs were preserved, their salaries maintained at then present levels, and they performed the same work they had done for Burlington.

Burlington manufactures textiles. Its executive offices and many of its facilities are in North Carolina. Its merchandising offices are in New York. It has plants and offices in many other states. Plaintiffs are residents of North Carolina, Tennessee, Ohio, and Quebec, Canada. Their positions ranged from Division President to Clerk.[2]

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[2] Two other similar actions were brought by former employees of the Divisions. Gilbert, et al and Lillian Roberts, Commissioner of the Department of Labor of the State of New York v. Burlington Industries, Inc. on appeal in this court, Nos. 85-441 and 85-460, and Brooks v. Burlington Industries, Inc., Docket No. 7198, Roane County Tennessee Circuit Court, dismissed July 2, 1985 for failure to prosecute.

Burlington has had a written policy providing severance benefits for eligible employees since 1953. In 1974 Burlington embarked on a program of retrenchment. Anticipating many jobs would be eliminated, management revised its severance policy to provide substantial transition pay to salaried employees forced to find new jobs in the midst of an economic recession through no fault of their own. The 1974 revision, adopted unilaterally by management, was not the product of negotiations with the employees. It was set forth in a revised section of the Company Policy Manual available to all salaried employees through the supervisors, personnel managers, and department heads in every plant and office. The 1974 revision expressly stated that "job elimination" was a condition of eligibility for severance. Burlington's Director of Personnel Management who drafted the 1974 revision stated that the "job elimination"

requirement was intended to mean and has since been interpreted by Burlington as meaning that employees who actually lose a job, as opposed to those who undergo a change of management, are entitled to severance benefits. Officers of the company who handled the plaintiffs' grievances testified to the same understanding. In addition to the Policy Manual, many employees were also notified of the severance plan in the Policy Manual by a salaried employees handbook. First published in 1976, revised in 1978 and again in 1981, it contained highlights of Burlington's benefit plans and other matters. Employees were referred to their supervisors or personnel representatives if they had any questions and were advised that the policies were subject to change. Burlington also followed an "open door" policy, encouraging all employees to seek advice from supervisors, personnel managers and department heads concerning

any aspect of their employment, including the application of benefit policies in specific situations. When advising employees as to eligibility for benefits, management employees applied the policies set forth in the Policy Manual. The 1978 edition of the handbook specifically mentioned involuntary termination "due to job elimination" as a condition of eligibility for severance. The 1981 edition of the handbook added information on more subjects and some summaries, including the severance description, were shortened. Every plaintiff testified by deposition. Some plaintiffs received the 1978 handbook but not the 1981 handbook. No one who received a 1981 handbook noticed any difference in the section on severance benefits. It was undisputed that the plaintiffs had access to the Policy Manual where the severance policy was fully set out.

Burlington consistently applied the Manual and paid severance benefits to employees whose jobs were eliminated and denied severance benefits to employees whose jobs were preserved. When Burlington sold the Hosiery and Socks Divisions in 1982, it applied the severance plan in the same manner it always had and in accordance with the Policy Manual.

Burlington held meetings with its employees in October 1981 and went over the details of the impending sale: the Divisions were being sold as going concerns, Kayser-Roth would continue the business using Burlington's trade marks and trade names under license, Burlington would be completely out of the socks and hosiery business, and Burlington agreed not to hire any former employee for a period of six months after the sale. Kayser-Roth agreed to credit their new employees with all their time of service with Burlington. Employees were reminded

of the severance policy and told that severance benefits would be paid to all employees whose jobs were eliminated and that employees whose jobs were preserved would not receive severance benefits. After the initial announcement and in response to concerns expressed by its employees, Burlington extended the availability of severance benefits to employees who were involuntarily terminated by Kayser-Roth (other than for disciplinary reasons) during the first six months following their transfer to Kayser-Roth.

The testimony of Nadine Albright is typical of most of the plaintiffs. She received a handbook and remembered that job elimination was one of the requirements for severance pay. She read about severance pay in the Policy Manual and may even have computed her benefits from the tables in the Manual. She said the Manual is more detailed than the handbook and explained "about anything you would want

to know about the company." She never discussed severance pay with any management representative. She did not rely on the Burlington severance pay plan in making any employment decisions. In all her years at Burlington she never even thought about the divisions being sold. After the sale to Kayser Roth, she got a 6-7% raise.

The transfer of the Divisions occurred at midnight, January 3, 1982. Employees coming to work on January 4, 1982, went to work at the work stations and desks that had been theirs on the previous day. The Divisions continued to operate as going concerns, and there was no substantial displacement of employee functions due to the transfer. No plaintiff lost a day of work because of the sale.

Sometime after the sale some employees who had previously been stationed at Burlington's J. Spencer Love Center in Alamance County were relocated to a Kayser-Roth facility in Greensboro. In

individual cases, these employees received severance pay from Burlington if they were unable to continue in their employment with Kayser-Roth and applied to Burlington for severance pay on a discretionary, hardship basis.

After the announcement of the sale and application of the severance policy several employees, including some of the plaintiffs, appealed the decision through Burlington's grievance procedure. They met with three of the highest officials of Burlington who were designated as the President's Committee to hear the grievances. The committee explained to the employees that they would not receive severance pay because they were not eligible under Burlington's written severance policy because their jobs were not eliminated.

Following institution of this lawsuit by plaintiffs, there was some confusion at Burlington about whether Burlington would hire any of the plaintiffs if one should

apply. That confusion was eliminated when H. L. Quintana, Vice President for Personnel, issued a directive making it clear that any qualified plaintiff would be considered for employment. No plaintiff was ever denied employment because of his or her status as a plaintiff and plaintiffs conceded no one was known to have been penalized.

MOTION TO DISMISS OR AFFIRM

The appellee Burlington Industries, Inc. moves to dismiss the appeal or affirm the judgment of the Court of Appeals.

There is no basis for the appeal under 28 U.S.C. §1254(2). No state statute has been invalidated. The only issue on appeal is the construction of a federal statute: that is whether this particular employer's written severance benefit policy constitutes an "employee welfare benefit plan" under ERISA. [J.S.i.]

Alternatively, Burlington moves to affirm the judgment of the Court of

Appeals. The unanimous decisions of the courts below conform to the statute, the Secretary's regulations approved by Congress' 1980 amendments to the statute, and the decisions of five other circuits and numerous district courts.

A. There is No Conflict of Decisions.

Analagous decisions in the Second, Seventh, Eighth, Ninth and Eleventh Circuits and other decisions in the Fourth Circuit and many District Courts are cited in Burlington's Motion to Affirm in Gilbert et al v. Burlington, No. 85-441 and No. 85-460 at pp. 10-12.

The Second Circuit's decision in Gilbert, et al involves a similar holding on the identical severance benefit policy and involving the same sale of divisions by Burlington. The Second Circuit held that Burlington's policy was an ERISA "plan" and that the state law claims asserted by a separate group of former Burlington employees were preempted by ERISA.

Thus, at the present time at least six Circuits and numerous District Courts have decided the issue presented by this appeal in a like manner. Two Circuits have addressed the identical issue and have reached the same conclusion, based on the same reasoning, without a dissent.

B. There is No Substantial Federal Question.

The Commissioner argues that this Court must face "the task of giving a more precise definition of 'welfare benefit plan'" than either the statute or the regulations. [J.S.11] Burlington submits that that is not an appealable issue.

The Court of Appeals distinguished employee pension benefit plans from employee welfare benefit plans,[3] and

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[3] ERISA requires vesting and separate funding for pension plans but not welfare benefit plans. See 29 U.S.C. §1051(1), 1081(a)(1). Traditionally severance pay policies were unfunded arrangements providing wholly contingent benefits. Recognizing the effect the new

considered whether Burlington's severance pay provision, admittedly not an employee pension benefit plan,

> "constitutes an employee welfare benefit plan or a mere 'payroll practice' -- as defined by Department of Labor regulations 29 C.F.R. §2510.3-1. -- that falls outside the scope of ERISA." [A.10]

The Court specifically rejected the Commissioner's contention that the Secretary of Labor lacked authority to interpret the statute in the manner of the regulations to include severance benefits in the definition of "welfare plan," holding that Congress in 1980 by specific language confirmed the authority of the

(Footnote 3 continued)

law would have if they were treated as pension plans the Secretary of Labor, in 1975 and 1979, issued regulations that "an arrangement" providing severance benefits would not be treated as a pension benefit plan if the payments were not contingent upon retirement and if the total amount paid would not exceed twice the employee's annual compensation. 29 C.F.R. §2510.3-2(b). If a severance pay arrangement was not treated as a pension plan under this rule, it was nonetheless to be treated as an "employee welfare benefit plan" under the Act. 29 C.F.R. §1410.3-1(a)(3).

Secretary and approved his previously issued regulations under which

> "severance pay arrangements ... shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." [A.12]
>
> [See 29 U.S.C. §1002(2)(B)]

Burlington's additional reasons for affirmance are set forth in its Motion to Affirm in Gilbert et al v. Burlington Industries, Inc., Nos. 85-441 and 85-460 at pp. 12-22.

WHY THE WRIT SHOULD NOT BE GRANTED

A. The Plan Administrator's Decision was Properly Reviewed: Was the Decision Arbitrary, Capricious or Unreasonable?

The Court of Appeals, affirming the District Court, held that:

> In reviewing determinations of claim eligibility under ERISA, we employ an "arbitrary and capricious" standard. [Citing cases from 3rd, 4th, 6th, 7th and 8th Circuits. A.32-33]
>
> * * *
>
> Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with administrators "whose experience is daily and continual, not with judges whose exposure is episodic and occasional." Berry, 761 F.2d at

> 1006. This objective holds true whenever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue. Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary or capricious manner, must remain with those who formulate and administer company plans and policies whether formally trustees or not. [Citing cases.] To vary the standards of judicial review for general asset welfare plans would only sow confusion in ERISA, which we decline to do. [A.33-34]

Plaintiffs attack this Standard of Review and its application here.

The prevailing standard is that a claims decision made by a plan administrator will not be set aside in an action for plan benefits unless the administrator's decision was arbitrary and capricious.[4]

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[4] Adcock v. Firestone Tire & Rubber Co., ___ F.Supp. ___, No. 3-83-0037 (M.D. Tenn. August 6, 1985); Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, ___ U.S. ___, (October 7, 1985); DiCarlo v. Supermarkets General Corp., ___ F.Supp. ___, No. 83 Civ. 8236 (S.D.N.Y. May 31, 1985); Gilbert, et al supra, on appeal in this court, Nos. 85-441 and 85-460; Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985); Pabst Brewing Co. v. Anger, 610 F.Supp. 214 (D. Minn.

This standard of review is applied whether the "plan" is an employee pension plan or, as here, an employee welfare benefit plan providing for severance benefits. Sly v. P.R. Mallory & Co., Inc., supra at 1211; Jung v. FMC Corp., No. C82-0018 WAI (N.D. Cal. 1983) at 3. Furthermore, that the administrator is the employer does not alter the standard of review. Id.; see also Rosenthal v. National Life Ins. Co., 486 F.Supp. 1018, 1022 (S.D.N.Y. 1980).

(Footnote 4 Cont.)

1985); Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Miles v. New York State Teamster Conf., 698 F.2d 593 (2d Cir. 1983); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2nd Cir. 1982); Riley v. MEBA Pension Trust, 570 F.2d 406 (2nd Cir. 1977); Van Gunten v. Central States Pension Fund, 672 F.2d 586 (6th Cir. 1982); Peckham v. Board, 653 F.2d 424 (10th Cir. 1981); Horn v. Mullins, 650 F.2d 35 (4th Cir. 1981); Chastain v. Delta Air Lines, Inc., 496 F.Supp. 979 (N.D. Ga. 1980); Taylor v. Bakery & Confectionary Union, 455 F.Supp. 816 (E.D.N.C. 1978); Morse v. Stanley, 566 F.Supp. 1455 (S.D.N.Y. 1983); Rynar v. Ciba Geigy Corp., 560 F.Supp. 619 (N.D. Ill. 1983).

Plaintiffs rely on Struble v. New Jersey Employee Welfare Trust Fund, 732 F.2d 325 (3rd Cir. 1984). The Court of Appeals correctly distinguished Struble, pointing out that the trustees' action in that case affected adversely all potential beneficiaries of the plan.

> Here by contrast one group among many potential beneficiaries of a company plan dispute the denial of their claims and the issue is not, as in Struble, whether the trustee "have sacrificed the interest of the beneficiaries as a class in favor of some third party's interest." [A-35].

Struble involved fund management, not claim eligibility. Likewise Jung, 755 F.2d at 711 distinguished Struble.

Plaintiffs also rely on Blau, supra, arguing that it requires a different standard. We submit the standard was the same but the facts were different. Each case must be considered on its own merits. The court below distinguished Blau on the facts. In Blau, the employer actively concealed its plan from the employees.

Here, every employee was given a general statement and a detailed description was available to every employee upon request. In Blau, the employer never informed its employees of the decision to deny severance. By contrast, Burlington promptly informed the appellants that severance pay was not available under the terms of the policy because their jobs were not eliminated but preserved.

Language of the Plan. Because a plan administrator must interpret the plan in a manner consistent with the plain language of the plan, Miles supra at 599, the starting point in the analysis of Burlington's claims decision is the language of the plan itself.

The plain meaning of Burlington's plan language is that a full-time salaried employee who is "involuntarily terminated from the Company" is eligible to receive severance pay if he is terminated in circumstances involving "job elimination."

Thus there are two conditions of eligibility: "involuntary termination" and "job elimination." Any involuntary termination from Burlington involves loss of a job at Burlington. The second eligibility requirement must therefore refer to something else. Burlington has consistently interpreted the words "job elimination" as referring to the elimination of jobs as such and when jobs are preserved as a result of an organizational change, as here, the mere loss of employment at Burlington has not triggered eligibility for severance pay.

The general rule is that a plan administrator is required to give reasonable effect to all of the words of the plan instrument. Indeed, if the administrator's interpretation has the effect of "render[ing] some provisions of the plan superfluous," the administrator may be deemed to have acted in an arbitrary and capricious manner in violation of ERISA.

Miles, supra at 599. Since Burlington's interpretation of its plan is rational in view of its language, this claims decision was not arbitrary or capricious insofar as the language of the plan is concerned. Indeed, even if there were other rational interpretations of the language of the plan -- interpretations that would have led to a different claims decision in this case -- Burlington's interpretation, being rational and nonarbitrary, should be upheld. Miles, supra, at 599-601.[5]

Decisional Law. The reasonableness of Burlington's interpretation is supported by relevant judicial decisions involving similar plan provisions. Burlington's policy and the language of its plan contain the very elements that were viewed as dispositive by the courts in Jung and

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[5] See also Gordon v. ILWU-PMA Benefit Funds, 616 F.2d 433, 439-40 (9th Cir. 1980); Donaldson v. Hamburg Savings Bank, 568 F.Supp. 897 (E.D.N.Y. 1983) (McLaughlin, J.).

Sly. All three plans (a) required job elimination as a condition of eligibility, (b) were intended as a form of unemployment benefit, and (c) included provisions for the placement of employees who were qualified for severance payments, and were therefore, presumably, without jobs. Moreover, Burlington's plan contained language suggesting that involuntary termination from the company, in and of itself, was not sufficient to trigger severance pay. Thus, Burlington's plan, when read as a whole, presents an even stronger case for the interpretation placed upon it by Burlington than the plans in Jung and Sly.

Purpose of the Plan. As to the subjective intention of management, the record discloses no genuine dispute over the reason or "purpose" behind the adoption of Burlington's severance pay policy: to provide financial support to employees whose jobs are lost through no willful fault of their own and who might

therefore be in need of financial resources during a period of unemployment. The purpose is fully consistent with the common understanding of severance pay:

> "In general, a severance allowance is payment by an employer to an employee on termination of the employee's employment. Black's Law Dictionary, 1232 (5th ed. 1979). Such payment is beyond wages and is usually designed to ease the employee's financial burdens while looking for new employment. See Owens v. Press Publishing Co., 20 N.J. 537, 120 A.2d 442 (1956)." Dhayer v. Weirton Steel, 571 F.Supp. 316 (N.D. W. Va. 1983), aff'd 724 F.2d 406 (4th Cir. 1983), cert. den. 104 S.Ct. 2387 (1984)."

Indeed, it is arguable that the purpose of the program would have been

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See also Petrella v. NL Industries, Inc., 529 F.Supp. 1357, 1361 (D.N.J. 1982) ("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an 'unemployment' benefit"); Younger v. Thomas International Corp., 275 Ark. 327, 629 S.W.2d 294 (1982); In re Brooklyn Citizen, 1 Misc.2d 162, 90 N.Y.S.2d 99, 103 (Sup. Ct. Kings Cty. 1949) ("Severance pay is provided in order to assure a worker whose employment is terminated funds to depend on while he seeks another job.").

undermined if the requirement of "job elimination" had been given the interpretation the plaintiffs wish. Employees whose jobs are not eliminated as a result of an organizational change have a far less forceful claim to the general resources of the company than do employees whose jobs are eliminated. To pay severance to employees who still have jobs would diminish the resources available to all under the general policy.

Where "a rational nexus exists between the purpose of the Plan and [the administrator's] decision," the decision "cannot be deemed arbitrary and capricious." Gordon, supra at 440; Pete v. United Mine Workers of American, etc., 517 F.2d 1274, 1286 (D.C. Cir. 1974).

Burlington's Past Practice. The conclusion that Burlington's interpretation of its plan was reasonable and in accord with its underlying purpose is bolstered

by the company's consistent denial of severance benefits to employees whose jobs were continued with successor companies. In Gordon, supra, the Ninth Circuit held that:

> "Such adherence to a consistent pattern of interpretation is significant evidence that the trustees have not acted arbitrarily."

Id. at 440. In Morse, supra, the district court held that:

> "... defendants' application of this policy to plaintiff was neither arbitrary nor capricious in view of their prior denial of payment to others...."

Id. at 1458. See also Sly, supra at 1211; Jung, supra at 713; Petrella, supra at 1362-63.

In this case, it is clear that since the inception of Burlington's present severance policy in late 1974 the company has consistently applied that policy, in the context of plant and division sales, to bar severance pay to employees who continue in their jobs under new management. To have treated the plaintiffs differently

from their counterparts who were involved in prior plant and division sales, retained their jobs under new management, and were not given severance benefits, would have constituted an improper discrimination between similarly situated participants -- conduct which is prohibited by ERISA. Cf. Petrella, supra at 1362.

ERISA does not require an employer to establish and maintain a severance pay policy or any other kind of welfare benefit plan, and ERISA does not require that such a plan contain any particular provision as to the conditions under which welfare benefits will or will not be paid. Under ERISA, eligibility for welfare benefits is determined solely by the provisions of the plan itself. ERISA requires only that the plan be administered rationally and in accordance with its terms and purposes, whatever they may be.

The Court below held that Burlington's construction of its written plan, giving effect to the eligibility requirement of "job elimination," was "certainly a reasonable one, especially when viewed in light of the goals of the plan." [A-38]

> Under these circumstances, the denial of severance pay benefits to the appellants was not arbitrary and capricious, but was, in fact, a perfectly reasonable interpretation of Burlington's severance pay policy which courts may not replace with an interpretation of their own. LeFebre, 747 F.2d at 204-05. [A-40].

The plaintiffs argued in the abstract in both the district court and the Court of Appeals that severance pay vests and that the benefits accrue to each employee every day.[7] This may be true of pension plans but ERISA distinguishes between pension benefit plans and welfare benefit plans. The latter do not vest and do not require a separate fund or a separate

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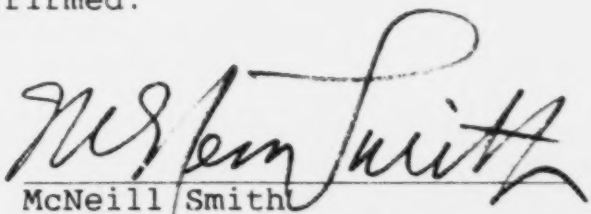
[7] Tr. of Hearing, August 27, 1984, p. 56 and Plaintiffs' Brief in Court of Appeals, p. 40.

trustee. Severance under Burlington's plan and on the facts of this case is wholly contingent requiring both (1) termination of employment with Burlington and (2) job elimination. Both events must occur because the plan calls for both. To disregard either would be arbitrary and capricious, unreasonable and unfair to the thousands of other Burlington employees. When this case is viewed on its facts there has been a full and fair hearing within the company and in the district court. The district court and the Court of Appeals have examined this record in detail and concluded that the plaintiffs have not been denied rights to which they are entitled. The standard of review applied by the courts below insures the achievement of ERISA's purposes on the basis of uniform federal law. Every eligibility determination does not require a trial de novo in Court. The best

procedure is to respect the plan administrator's decision unless it is arbitrary or capricious or in bad faith (as in Blau). The plan administrator has an obligation to all employees, not just to those who make claims when their jobs have not been eliminated.

CONCLUSION

The individual plaintiffs' petition should be denied and the Commissioner's appeal should be dismissed and the judgment below affirmed.



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No. 85-944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,

Appellant,

—against—

BURLINGTON INDUSTRIES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF NEW YORK, *ET AL.* IN SUPPORT OF APPELLANT JOHN C. BROOKS

Statement of Interest of *Amici Curiae*

This brief is filed on behalf of 33 states as *amici curiae* pursuant to Rule 36.4 of the Supreme Court Rules, in support of the Jurisdictional Statement of appellant John C. Brooks, Commissioner of Labor of the State of North Carolina.

The issues raised by the appeal in this case are of critical importance to all states, including New York and the thirty-two other *amici* joining in this brief.* The

* This case is of particular interest to the State of New York, because its Commissioner of Labor has appealed to this Court

(footnote continued on following page)

Court of Appeals for the Fourth Circuit held that N.C. Gen. Stat. § 95-25.7, which requires employers to pay their employees all promised wages promptly after termination of the employment relationship, is preempted by the Employee Retirement Income Security Act, as amended, ("ERISA") 29 U.S.C. § 1001 *et seq.*, to the extent that the State law would require appellee Burlington Industries, Inc. ("Burlington") to comply with its severance pay policy. In addition to North Carolina, at least 46 states and the District of Columbia have similar laws designed to enforce employer obligations to pay wages due to employees, and 31 of those jurisdictions include severance pay among the wages whose payment is enforced. These jurisdictions have established and maintain programs to assist their citizens in the enforcement of rights acquired through the employment relationship. By virtue of these laws and programs, these states' capacity to aid employees in obtaining wrongfully denied benefits is far greater than any remedy provided by ERISA or any federal agency.

If the Fourth Circuit's decision is upheld, these states will be precluded from carrying out their traditional wage and hour enforcement responsibilities in the unfortunately all-too frequent instances that employers fail to keep their promises to pay severance benefits. The states' substantial interest in retaining their authority to protect their citizens from such abusive employment practices prompts the *amici* to submit this brief in support of the North Carolina Commissioner of Labor.

(footnote continued from previous page)

from the decision in *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *appeal filed sub nom. Roberts* v. *Burlington Industries, Inc.*, 54 U.S.L.W. 3179 (U.S. Oct. 1, 1985) (No. 85-441), which involves the same issues presented in this appeal.

Summary of Argument

This Court should grant plenary consideration of the substantial federal question of preemption raised by this appeal. Whether ERISA preempts state wage enforcement statutes insofar as they compel employers to abide by their own severance pay policies is a question of vital concern to the states, since protecting employee health and welfare has historically been their responsibility. The decision of the Court of Appeals, if allowed to stand, will radically intrude upon the states' traditional authority in this area in a manner never intended by Congress. In addition, it will deny millions of employees throughout the country the valuable protection and administrative procedures afforded by state laws.

Moreover, the precise question raised by this appeal, whether an employer's bare promise to pay a benefit such as severance pay establishes an "employee welfare benefit plan" within ERISA's meaning, has never before been addressed by this Court. In answering that question affirmatively, the Fourth Circuit misinterpreted the scope of ERISA's coverage, which is limited to employee benefit "plans," entities distinct from the employer itself, and does not include a simple payroll practice in which an employer pays its workers a benefit out of the company's general assets.

I. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE ISSUE PRESENTED IS OF GREAT IMPORTANCE TO ALL STATES AND MILLIONS OF EMPLOYEES THROUGHOUT THE COUNTRY.

Almost every state in the nation is affected by the issue presented by this appeal. Forty-six states and the District of Columbia have laws similar to North Carolina's requiring employers to pay promised wages. Thirty-one of those forty-seven jurisdictions include severance pay promises as enforceable under their laws. The effect of the Fourth Circuit's decision in this case, if not reversed, would be to preempt these numerous provisions and destroy the traditional balance between federal and state authority to protect employees' rights to earned compensation.

Historically, federal laws regulating employee compensation have permitted the states to establish or maintain parallel legislation providing similar or more protective rights, and have left them free to establish administrative mechanisms to make enforcement of claims a real possibility for workers who might otherwise be unable to afford the cost of judicial enforcement. *See, e.g.*, § 18 of the Fair Labor Standards Act, 29 U.S.C. § 218; § 14 of the Age Discrimination in Employment Act, 29 U.S.C. § 633; and § 1104 of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4. Far from preempting state regulation, these federal laws encouraged the growth of the protective wage and hour legislation which the Fourth Circuit's holding has now thrown into jeopardy.

This appeal merits plenary consideration because, in enacting ERISA, Congress simply did not intend such a radical disruption of the states' traditional authority as

would result from the Court of Appeals' decision.* Instead, Congress intended to *increase* the protections available to workers in an area that had been entirely unregulated by state law: that is, the realm of employee benefit funds, entities which are independent from the employers that establish them and which had escaped meaningful control because of their legally separate status. *See infra,* pp. 9-14. By contrast, simple payroll practices, in which an employer merely promises to pay a benefit out of the company's general assets, had long been adequately regulated by the states,** and nothing in ERISA or its legislative history suggests that Congress intended to invade this area of historic state responsibility. *Id.*

Indeed, Congress had no reason to disturb or attempt to improve upon state laws regulating such payroll practices, since the states had developed effective mechanisms to assist employees in collecting earned benefits owed to them directly from their employers. For example, each of the thirty-one jurisdictions enforcing severance pay promises provides an administrative procedure to assist

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* The Fourth Circuit's holding that Burlington's simple payroll practice is a benefit "plan," subject exclusively to ERISA regulation, also could have disasterous consequences for the states' ability to legislate in a score of other areas which in some way involve or touch upon employee benefits. For example, many states regulate certain professions by requiring periodic or occasional training. *See, e.g.,* N.Y. Gen. City Law §§ 18 and 20(27). Many states also regulate child day care centers. *See, e.g.,* N.Y. Social Serv. Law § 390. Yet, since ERISA's definition of a benefit plan expressly encompasses plans which provide training and day care, under the Court of Appeals' holding, any time an employer simply promises to provide such a benefit, it becomes subject to ERISA regulation and the states are precluded from enforcing their laws.

** For example, N.Y. Labor Law § 191, subd. 3, New York State's wage enforcement statute comparable to N.C. Gen. Stat. § 95-25.7, derives from legislation (former §§ 196 and 196-c of the Labor Law) which has its origin in statutes first adopted in 1890. *See People* v. *Vetri,* 309 N.Y. 401, 405, 131 N.E.2d 568, 570 (1955); 1906, Op. N.Y.S. Att'y Gen. 448.

in substantiating and collecting employees' unpaid wages.* These jurisdictions maintain administrative staffs to help employees pursue their claims and, in many of the jurisdictions, to bring criminal actions and/or civil suits on behalf of the employees against delinquent employers. Such procedures and assistance have proved to be crucial in ensuring payment of the promised severance pay, since the number of employees or the amount of money involved often is so small that pursuit of a claim is otherwise practically impossible.**

The Fourth Circuit's holding therefore would have a devastating impact on the millions of workers in the many states that enforce employer promises of severance pay in the event that their employment is ever terminated,*** an effect contrary to Congress' intent to expand worker protection. By interpreting ERISA as preempting these valuable state laws and establishing it as the only basis

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* The Appendix to this brief contains examples of assistance available to employees in several of the *amici* jurisdictions.

** In the five-year period from 1980-1984, the New York State Department of Labor handled 16,453 claims for wage supplements and collected $3,073,144 in unpaid benefits. While such benefits are crucial to a family trying to make ends meet until new work can be found, at an average of less than $190 per claim, the cost of court and attorney's fees makes collection impractical in the absence of state administrative assistance.

*** Although many of the employees in this case found employment with Burlington's successor, the Court of Appeals' decision is equally applicable in situations where employees are out of work for long periods of time. The potential effect of the court's ruling is indicated by a recent study of twenty-one million employees from a cross-section of the nation's medium and large private firms. That study shows that sixty-one percent of professional and administrative employees, fifty-seven percent of technical and clerical employees and thirty percent of production employees are eligible for severance pay under their employers' policies. *See* "Employee Benefits in Medium and Large Firms, 1984," U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2237 (June 1985).

for collecting severance pay, the Court of Appeals' decision virtually ensures that most claims for such benefits will never be satisfied. ERISA requires an employee to bring a civil action in federal or state court in order to collect even one week's worth of severance pay, since ERISA does not provide an administrative mechanism for the collection of benefits. 29 U.S.C. § 1132(a). The thirty-one jurisdictions enforcing severance pay obligations have, collectively, more than a thousand persons on staff to assist employees in pursuing their claims, while the United States Department of Labor has almost no facilities or personnel to handle employee complaints.*

Furthermore, an employee forced to pursue a claim for severance pay under ERISA may be much less likely to vindicate the claim than under state law, because ERISA generally has been interpreted to impose only a fiduciary standard of conduct on a plan administrator who fails to pay a promised benefit. The employee in such a case has the burden of proving that the administrator acted arbitrarily or capriciously in denying the benefit, rather than being able to simply enforce the employer's promise as a contractual obligation. *See, e.g., Pompano* v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911 (2d Cir.

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* For example, the New York State Department of Labor, Division of Labor Standards, employs approximately 125 professionals to investigate and conciliate complaints of employer failures to pay wages and benefits within the State. The Division maintains eleven district and sub-district offices throughout the State to receive such complaints.

By contrast, the United States Department of Labor ("USDOL"), Office of Pension and Welfare Benefit Programs, has only two offices for all of New York, New England and part of New Jersey. These two offices employ only 37 investigators, whose principal function is to inspect trust fund records to discover mismanagement or fraud in the handling of fund assets by fund trustees, not to assist employees in obtaining earned but unpaid benefits. In no case does the USDOL bring a civil or criminal action to compel payment of benefits due to an employee.

1982); *Horn* v. *Mullins*, 650 F.2d 35 (4th Cir. 1981); *Smith* v. *CMTA-IAM Pension Trust*, 654 F.2d 650 (9th Cir. 1981). As this case so well demonstrates, when employees are subjected to that burden of proof, they are often unable to recover benefits which they might otherwise recover under state laws, since the state laws generally only require the employee to establish that the employer promised to pay the benefit and then defaulted on the promise.

The direct consequence of decreasing the likelihood that employees will receive their promised severance pay is an increase in the social and economic burdens upon the states and their citizens. If employees are not paid their severance wages when due, they and their families often suffer severe financial hardship. Many wage earners live on such tight budgets that the loss of just one paycheck can result in a family crisis. Rent goes unpaid, utilities are shut off, and even sufficient amounts of food and other necessities can become unaffordable. When such financial crises strike families, states bear the financial burden through social service programs designed to protect the general welfare of their citizens. Unemployment benefits, general and special assistance, and other costly forms of social relief increase when earned wages go unpaid. These social programs cost the state and their taxpayers substantial sums of money.

Since the Fourth Circuit's decision thus would cripple employees' ability to recover earned but unpaid severance pay, create substantial burdens on state economies and taxpayers, and destroy the balance of state and federal authority to protect employee wages and benefits, this Court should grant plenary consideration of this appeal to restore the proper balance that Congress intended and to preserve state authority in an area of critical importance to working people.

II. WHETHER A SIMPLE PROMISE TO PAY SEVERANCE BENEFITS CONSTITUTES A "WELFARE BENEFIT PLAN" WITHIN THE MEANING OF ERISA IS A SUBSTANTIAL QUESTION WARRANTING THIS COURT'S PLENARY CONSIDERATION.

A. *Congress Did Not Intend That ERISA Regulate Employer Promises to Pay Benefits to Employees.*

1. Congress Intended ERISA to Regulate the Unregulated Field of Benefit Plans.

ERISA's legislative history demonstrates unequivocally that Congress viewed it as regulating entities separate and distinct from employers. Even though benefit funds were established by employers (and sometimes by unions), they had a legal existence of their own in which they, not the employers who established them, were liable for payment of benefits. It was precisely the separate and independent status of these funds that lead to the problems which Congress sought to remedy through ERISA.

In 1974, after extended study, Congress enacted ERISA to protect the interests of participants in employee benefit plans. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). One of the central purposes of ERISA was to prevent the "'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980).

The subject of congressional concern, the benefit plan, was a "relatively modern economic institution" which had become an important social and economic factor only since the mid-1940's. H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4640. Benefit plans, Congress found, were subject to

only minimal, inadequate federal regulation* and were virtually unregulated by state legislation. *Id.* at 4641-42. *See* Senate Committee on Labor and Public Welfare, Final Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 68 (1956); Senate Committee on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 634, 92d Cong., 2d Sess. (1972). The plan participants were left to rely upon the state common law of trusts, codified in only a few states, which Congress found insufficient because state law, like existing federal law, did not adequately protect the security of pension benefits. *See* H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4643.

Employers' compensation practices, on the other hand, were not a recent phenomenon and had for decades been effectively supervised by state courts and administrative systems, pursuant to legislation and common law contract principles. Congress' concern thus was not with enforcing *employer* contractual obligations to employees, but with the inability or unwillingness of *benefit plans* to meet their benefit obligations to participants because of overly strict vesting requirements, inadequate funding, and misfeasance and malfeasance by the administrators and trustees.**

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* Not until 1958 did Congress enact legislation, the Welfare and Pension Plans Disclosure Act, repealed by ERISA, which was specifically designed to regulate benefit plans. *See* 29 U.S.C. § 301 *et seq., repealed by* ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1). By requiring the disclosure of information about plans, that Act was intended to permit the participants to protect themselves. However, without substantive standards for plan operation, its intent was not fully achieved. H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4641-42.

** In 1971, the Senate Committee on Labor and Public Welfare reported on a number of case histories illustrating these flaws in

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In ERISA, therefore, Congress prescribed minimum standards of vesting, funding, and fiduciary conduct to minimize the risk that workers would lose expected benefits. 29 U.S.C. §§ 1053, 1082, and 1102-1104. It provided a system of compulsory benefit insurance to protect the security of benefit rights in the event of benefit plan termination. 29 U.S.C. §§ 1321-1323. Congress also created a federal right of action for employees to recover benefits due from a plan. 29 U.S.C. § 1132(a) and (f). Such provisions would have been superfluous if Congress' intent in ERISA had been to regulate an employer's contractual liability to its employees and provide a remedy for an employer's breach of its contract obligations.

The problems which ERISA was enacted to remedy—the lack of employee knowledge about plan terms and conditions, and the risk of loss of benefits in the event of plan termination because of underfunding, lack of vesting provisions, and negligent or fraudulent plan management—were problems which prior to ERISA had no adequate remedy in the law. There existed no federal and only a few state statutes providing a right for an employee to sue a plan and, even if an employee did sue under state law, the common law of trusts which was generally applied to that type of a claim was not adequate to pro-

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the private benefit plan system. For example, in one case, a joint union-employer trust plan had no vesting provision and had $800,000 in loans outstanding for which there was no collateral. Similarly, the Senate Committee pointed to a major aerospace company's pension plan in which 20,000 out of 60,000 participants left the plan without entitlement to any benefit, even though one-fourth of those 20,000 had over five years of service. Furthermore, that plan's liabilities exceeded its assets by more than $75 million. Thus, the report concluded, "if the plan were to terminate today, employees with vested benefits would have no legal remedy to obtain all their vested benefits." S. Rep. No. 1734, 84th Cong., 2d Sess. (1956), Appendix at 138.

tect the employee's rights.* *See* Senate Committee on Labor and Public Welfare, Final Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 65-68 (1956).

2. Congress Did Not Intend ERISA to Supplant and Nullify Direct Employer Liability for Employee Benefits.

Congress was well aware that employers, having established a plan, had no financial responsibility for benefit payments beyond the contributions they were committed to make.** Senate Committee on Labor and Public Welfare, Interim Report of Activities of Private Welfare and Pension Plan Study, S. Rep. No. 634, 92d Cong., 2d Sess. 74 (1972). Given that understanding and the fact that states had been regulating employer compensation prac-

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* The report on the House version of ERISA states:

> In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. *Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording.* Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement.

H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4643 (emphasis added).

** For example, Representative Erlenborn commented:

> At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions.

120 Cong. Rec. 4285 (Feb. 26, 1974), *reprinted in* 2 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 3388 (Comm. Print 1976).

tices for decades, it is plain that ERISA was not intended to regulate employer-employee agreements involving benefits, and nothing in its text indicates otherwise.* To the extent Burlington's policy constitutes an obligation to pay benefits directly to its employees, the policy is not governed by ERISA.

That ERISA does not regulate or limit an employer's direct contractual obligations to its employees was noted by this Court in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). In *Nachman*, the Court found a difference between "plan liability" for benefits and "direct employer liability" for benefits. The employer in *Nachman* disclaimed liability in the plan document for payment of benefits. When the plant closed and the plan was terminated, the plan had only enough assets to cover 35 percent of the vested benefits. ERISA provides insurance for such terminations through the Pension Benefit Guaranty Corp. ("PBGC"), but imposes reimbursement liability on the employer for benefits paid by PBGC for up to 30 percent of the employer's net worth.

The employer asked the court for a declaration that it had no reimbursement liability, since it had disclaimed liability for any benefits beyond those which the plan's funds could satisfy and the plan could not satisfy the full amount of the benefit obligations. The employees,

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* The statutory provisions are directed to the regulation of a "plan" as an entity apart from an "employer." *See* 29 U.S.C. §§ 1022 and 1102. Under ERISA, the plan is to have a plan administrator who is required to publish and file an annual report for the plan. 29 U.S.C. §§ 1023 and 1024. A plan may sue and be sued, and a judgment against a plan is not enforceable against the employer who established it. 29 U.S.C. § 1132(d)(1) and (2). ERISA also prohibits certain transactions between a plan and the employer. 29 U.S.C. §§ 1106(a) and 1107.

the company argued, had no right to the full amount; therefore, it had no reimbursement liability.

Holding that a plan's liability governed by ERISA and addressed by plan termination insurance is separate from an employer's direct liability for benefits, this Court rejected the employer's argument. The Court distinguished clearly between the rights of employees to benefits which are enforceable against the plan and the rights employees may enforce directly against their employer: even if an employer by agreement limits its direct liability for benefit payments to employees, by doing so it cannot limit its employees' rights against the plan, rights which are regulated by ERISA. *Id.* at 378. The employer's disclaimer operated to protect it only from direct liability for benefit claims, and, indeed, this Court noted, had the employer not disclaimed liability, "the employees could sue the employer directly." *Id.* at 379 n.29.

The Fourth Circuit's decision in this case therefore is contrary to this Court's interpretation of ERISA in *Nachman*. *Nachman* distinguished between plan liability and employer liability and acknowledged that, in the absence of a disclaimer by the employer, employees could sue their employer directly. Given this Court's acknowledgement that ERISA does not alter the direct liability of an employer for benefits, the decision of the court below is simply incorrect: an employer's simple promise to directly pay its employees a benefit out of the company's assets may be enforced under state law.

B. ***United States Department of Labor Regulations Interpreting ERISA Establish That an Employer's Promise to Pay Benefits Directly to Its Employees Out of the Company's General Assets Is Not a "Plan" Within the Meaning of ERISA.***

The potentially unlimited breadth of the definition of "employee welfare benefit plan" in § 3(1) of ERISA prompted the USDOL to issue a clarifying regulation interpreting that definition to exclude employer "payroll practices" in which an employee receives compensation directly from employer assets. 29 C.F.R. § 2510.3-1. As examples of these "payroll practices" excluded from ERISA's coverage, the regulation lists sick leave pay, *id.*, § 2510.3-1(b)(2), and holiday and vacation pay, *id.*, § 2510.3-1(b)(3)(i), each of which is, like severance pay, a benefit enumerated in the section of ERISA describing the benefits which may be the subject of an ERISA plan. 29 U.S.C. § 1002.*

The USDOL excluded such practices from ERISA coverage because they are "associated with regular wages or salary," and, furthermore, because "the abuses which created the impetus for the reforms in [ERISA] were not in this area, and there is no indication that Congress intended to subject these practices to [ERISA's] coverage," notwithstanding that the broad language of the definition of "plan" could arguably cover them. Notice of Proposed Rulemaking, 40 Fed. Reg. 24642, 24642-43 (June 9, 1975). However, the regulation excludes these "payroll practices" only if the compensation is paid directly from the employer out of its general assets. 29 C.F.R. § 2510.3-1(b). This is in accord with Congress' intent since, where

* While the regulation does not specifically mention severance pay, it expressly states that the listed practices are only examples and that the list is not meant by the USDOL to be exhaustive. 29 C.F.R. § 2510.3-1(a)(4).

the employer itself is obligated to make the payments, there is no need for any special protection to secure the employees' benefits because the employees may sue the employer directly for the benefits, and a remedy under ERISA would add nothing to that long-established right. Only where there exists an entity other than the employer liable for the payments would the concerns of Congress require ERISA coverage.

No logical basis exists for distinguishing severance pay from the other "payroll practices" which the USDOL regulation excludes from ERISA's coverage. Severance pay, under Burlington's policy, is compensation paid directly by the employer out of its general assets, it is calculated on the basis of an employee's regular wages and length of service, and it is treated by Burlington as regular wages. It is an obligation for which Burlington itself, and not a separate and distinct plan, is liable.

Accordingly, under the reasoning of the USDOL regulation interpreting the scope of ERISA's coverage, Burlington's simple promise, contained in its personnel manual, to pay severance pay to its employees is not a "welfare benefit plan" within the meaning of ERISA. Burlington's severance pay policy therefore is not subject to ERISA's exclusive regulation, and state statutory and common law remedies remain viable means of enforcing that policy.

CONCLUSION

For all of the foregoing reasons, this Court should summarily reverse the opinion of the Fourth Circuit or grant plenary consideration of the significant question raised by the appeal of the North Carolina Commissioner of Labor in this case.

This 31st day of December, 1985.

Respectfully submitted,

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APPENDIX

Summary Description of Wage Payment Laws of Alaska, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Montana, Oklahoma, Vermont and Wisconsin

Alaska

Alaska has two wage collection statutes. One provides specifically for actions arising from violations of the minimum wage and/or overtime laws. This statute is commonly referred to as the "Alaska Wage and Hour Act," and closely parallels the Fair Labor Standards Act of 1938, as amended. *See AS 23.10.050-.150*

The second statute relates to wage claims, in general. *See AS 23.05.140-.260.* Claims accepted under this statute involve the contractual aspect of employment which deal with fringe benefits, primarily vacation or severance pay. An Alaska wage earner may choose a civil remedy either through the resources of the Department of Labor or on his own under a workman's independent right of action. The second remedy is exclusively used where the wages or benefits in question exceed the department's statutory minimum, exclusive of penalties, of $5,000. The Department has the authority to use internal administrative adjudication processes to resolve complaints. These processes, however, are not obligatory and the Department may move a claim directly into the courts for a final solution.

The courts are generally reserved for serious disputes or for employers subject to recidivism. Most claims are handled quickly using one or more informal conferences involving an investigator, the claimant, and the employer or employer representative, frequently an attorney. The

more formal hearing process is reserved for fact finding to clarify complicated questions of law, or to determine if criminal as well as civil sanctions are in order.

In Alaska there are currently 12 investigators and 4 technicians who investigate claims for wages and benefits or enforce other labor laws. The Department investigates and resolves 1,600 claims per year with the average resolution time, outside of court, being 5 months. It may take from 7 months to 2 years to litigate a claim depending on the amount of the claim and legal complexities which dictate whether the matter will be heard at the district or superior court level. About 10 percent of the Department's cases require formal litigation for resolution. The Department's resources are without charge to the claimant while legal fees in the private sector begin at about $85 per hour.

CONNECTICUT

The Connecticut Commissioner of Labor, through the Department of Labor, Division of Regulation of Wages, oversees enforcement of Connecticut's wage payment laws. *See* Connecticut General Statutes §§ 31-71a through 31-71i, 31-72 and 31-76k. Specifically, § 31-76k requires an employer to pay terminated employees all accrued fringe benefits where the employer has a policy or is party to a collective bargaining agreement providing for payment of such benefits upon termination. The fringe benefits covered by § 31-76i include vacations, holidays, sick days and severance pay. When the Department of Labor receives a complaint from a terminated employee that promised fringe benefits have not been paid, it engages in an administrative investigation through the mails or in person using one of its six Wage Employment Agents. An administrative hearing may be held if necessary to determine dis-

puted issues. When it determines that an employer has unlawfully failed to pay fringe benefits, the Department of Labor can initiate either a criminal action under § 31-71g or a civil action under § 31-72 to collect double damages.

DISTRICT OF COLUMBIA

The District of Columbia Wage Payment and Wage Collection Law, 36 D.C. Code §§ 101-110 (1981 ed.) enacted by Congress in 1956 (70 stat. 976), requires employers to make timely payment of wages to employees employed in the District of Columbia.

When an employer fails to pay wages (including vacation pay and severance pay) as required, an aggrieved employee has two recourses: he or she may file an action in court to recover the unpaid wages and liquidated damages, or file a complaint with the Office of Wage-Hour, D.C. Department of Employment Services. If the employee chooses the latter course, the employer is notified by letter of the filing of the complaint and the date and time of an administrative hearing. If a determination is made that the employer is in violation of the law, and refuses to pay wages found due, the case is transferred to the Corporation Counsel of the District of Columbia for filing of criminal charges or a civil action.

With a staff of 4 wage-hour compliance specialists assigned to investigate complaints and conducting administrative hearings, the staff during the past 5 years (1980-84) has processed 4,564 complaints from employees alleging violations of the Wage Payment and Wage Collection Law. Slightly more than one million dollars has been recovered in unpaid wages and damages for employees.

HAWAII

In Hawaii, an employee who is not paid all wages due may either file a claim with the State of Hawaii's Department of Labor and Industrial Relations or bring a civil action in a state court to recover any monies owed.

The Department of Labor and Industrial Relations, under the statutes and administrative rules and regulations relating to the Payment of Wages and Other Compensation Law, Chapter 388, Hawaii Revised Statutes, investigates and conciliates unpaid wage claims including vacation, sick, and severance pay. The law does not require the employer to pay any set amount as pay and benefits, but only to pay what the employer has promised to pay to the employee. If, after an investigation substantiating a claim for unpaid wages or other compensation is completed and the employer fails or refuses to pay the employee, the Department of Labor and Industrial Relations may file a lawsuit on the employee's behalf to collect the amounts owed. If the Department prevails in the lawsuit, the Department may recover, in addition to the unpaid wages, a penalty in an amount up to the amount of the wages due. The court must also order the employer to pay the costs of bringing the action and reasonable attorney's fees.

When the employee brings a civil suit, the employee, too, may recover the civil penalties as well as the costs and reasonable attorney's fees.

The statute also provides for criminal penalties. It is a misdemeanor for any employer to fail to pay wages under the Payment of Wages and Other Compensation Law or for any officer of a corporation to knowingly permit the corporation to fail to pay wages. The employer or officer is subject to a fine of not less than $100 or more than $10,000.

Seven investigators investigate and conciliate the approximately 1,200 claims which are filed each year with the Department. Approximately 90 cases were referred to the Attorney General for legal action during the last completed fiscal year.

Any complaint filed under ERISA is not accepted in Hawaii but must be filed in Washington, D.C. with the Division of Inquiries and Technical Assistance. Whether or not prompt action is taken on these complaints is not known. Therefore, it is very important to the people of Hawaii that the Payment of Wages and Other Compensation Law continue to be applicable in the area of wages and benefits.

ILLINOIS

The Wage Claim Division of the Illinois Department of Labor is responsible for enforcing the Wage Payment and Collection Act, Ill. Rev. Stat., Ch. 48, pars. 39m-1 to 39m-16 (1983).

Section 2 of the Act includes in its definitions of "wages" and "final compensation" any compensation owed an employee by an employer pursuant to an employment contract or agreement between the two parties. Even before this language was added to the statute, an Illinois appellate court construed the Act as covering severance pay claims.

Section 11 of the Act outlines the duties and powers of the Department, which include the authority to take assignments of wage claims and proceed civilly and to cause criminal complaints to be prosecuted. The statute also preserves a private right of action.

Workers who want to file a claim for wages or final compensation fill out a short application form. If the Division has jurisdiction, it writes to the worker's employer and asks for payment or a written response to the claim.

If the employer fails to respond, or if the worker disputes the response, the Wage Claim Division schedules a hearing in one of nine cities: Chicago, Springfield, Rockford, Peoria, Champaign, Marion, Collinsville, Rock Island or Effingham. At the hearing, a labor conciliator listens to both sides and examines any witnesses or written evidence. If the worker and employer do not reach a voluntary settlement, the conciliator either dismisses the claim or issues a demand for payment.

If the employer fails to comply with the demand, the Division institutes prosecution. An employer convicted of violating the Wage Payment and Collection Act can be sentenced to 30 days in jail or fined $500.00 for each day on which a violation occurs.

During the fiscal year ending June 30, 1984, the Illinois Department of Labor received 10,528 wage complaints claiming $15,498,980 due. Of this amount $3,786,232 involved vacation pay, severance pay or other fringe benefits. The Department held 8,827 hearings on wage claims during that year and resolved complaints involving $13,977,315. All of this was accomplished with a staff of fourteen.

MARYLAND

The intent of the Maryland Wage Payment and Collection Law is to provide a quick, simple method for employees to collect monies which were due them for services performed without cost to the employee. There are, of course, other remedies available to employees. Those remedies are, in most instances, time-consuming and involve either considerable cost to the employee or require certain knowledge which the employee does not have. A court date for a civil suit in the lowest state court is usually

two to three months in the future. A fee of $250.000 is the minimum charged by an attorney to prepare and litigate even the simplest civil suit. Even with the loose and informal procedures in the small claims court, the employee generally does not have the knowledge to pursue his claim.

The vast majority of claims are for relatively small amounts, usually two weeks' pay or less. The claimants are generally in the lowest paid jobs, many working at minimum wage. In 1983, the average amount collected per valid claim was $297.18.

The nature of these claims mandates that they be resolved as quickly as possible. The vast majority of cases received by the Employment Standards Service are resolved within 30 days. An administrative assistant and two clerical employees conduct the office functions; office and field functions are supervised by a Wage and Hour Investigator Supervisor. Approximately 40 percent of all claims are investigated by three specialists; the remainder are assigned to 16 other investigators in their areas of residence. Generally, the issues involved are emotional, requiring the investigator to exercise extreme tact and diplomacy to resolve the claim quickly and to the reasonable satisfaction of both parties. Because of the variety of employers involved, each investigator must have a broad business background.

The Wage Payment and Collection Law is codified as Article 100, Section 94, *Annotated Code of Maryland*. Subsection 94(4)(3) defines wages as "any remuneration, compensation, bonus, commission, and/or fringe benefit promised in return for services by an employee." By administrative decision, vacation pay, holiday pay, severance pay, pension payments, insurance payments and any and

all fringe benefits are included in the definition of wages. Simply stated, the employee must get what he was promised and this agency stands available to investigate all claims of nonpayment of promised monies.

A Wage Payment and Collection claim usually is initiated by a telephone call from an employee: "My boss won't pay me what he owes me." Two claims forms, one a condensed version of the other, are mailed to the employee. Once the completed forms are returned to the Service, confirmation of receipt is sent to the claimant. The condensed form is then sent to the employer with a letter explaining that the Commissioner has received a claim alleging that the employee is due wages which were earned but not paid.

If the employer agrees that the claim is valid, the employer is instructed to forward a check to the Employment Standards Service, payable to the Division of Labor and Industry. If the employer asserts that the claim in invalid, the employer is instructed to provide an explanation and documentary evidence to support the employer's position. The employer is informed that in the event a reply is not received, an investigator will meet with the employer at a specified time and date to attempt to resolve the claim.

In approximately 20 percent of all Wage Payment and Collection cases, a check or other adequate response is received. In these instances, a decision is made without the necessity of a personal visit by an investigator. If a response is not received or is inadequate, a Wage and Hour Investigator visits the employer at the scheduled date and time and attempts to resolve the claim. If agreement is reached, a check is collected for the claimant. If a claim cannot be resolved and the claim is determined to be valid,

the case is sent to the Office of the Attorney General for appropriate legal action.

During 1984, a total of 2,128 claims were investigated. A total of 467 claims were filed for vacation pay, or 22% of the total claims filed. Forty-three claims were filed for severance pay, or 2% of the total filed.

The informal, "let's get this dispute settled" method of resolving these claims result in speedy service to the claimant. A more structured approach as practiced by many federal agencies would result in a long protracted period where the employee would be deprived of wages which are sorely needed. The great number of claims would necessitate a huge increase in the number of federal compliance officers to investigate and resolve the claims. Many claims which are filed with this office are filed as a result of a referral from the Wage and Hour Division of the United States Department of Labor. There is no question but that the individual states are better able to serve the citizens in the collection of unpaid wages.

MONTANA

Montana's Wage Payment Act (Montana Codes Annotated §§ 39-3-201 through 39-3-215) provides one of the two alternatives a wage claimant may use to collect wages.

The other one would be to file a civil suit in court. In most cases court calendars are extremely burdened with cases and resolution is extremely slow.

When a wage claim is received in the office of the Labor Standards Division of the Montana Department of Labor and Industry, an investigation is commenced and a determination reached, if possible, of the validity of the claim.

In the event that either the claimant or respondent feels aggrieved by the determination, they have the right to a hearing. The hearing would be held under the Montana Administrative Procedure Act with rules of civil procedure and evidence applying.

If either party feels aggrieved by the decision of the hearing officer, the only appeal is to the District Court for judicial review. The Labor Standards Division may apply to District Court for a judgment or an order enforcing the decision of the hearing officer or a default order. *See* MCA § 39-3-212.

Employers doing business in Montana are not required by law to provide vacation pay, but once promised or made part of the employment agreement that promise must be complied with. *See* Attorney General's Opinion No. 56, September 17, 1949. Once earned, the vacation pay cannot be withheld by the employer or forfeited by the employee. Similarly, severance pay is not required by law to be given but meets the definition of wages once it's made part of the employment agreement.

In fiscal years 1982-1984, the Montana Department of Labor and Industry handled over 3,000 claims and collected over $1,400,000 in wages and fringe benefits owed.

OKLAHOMA

Title 40, Oklahoma Statutes 1982, § 165.1(3) defines wages as follows:

> "Wages" means compensation owed by an employer to an employee for labor or services rendered, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses and

> other similar advantages agreed upon between the employer and the employee, which are earned and due, or provided by the employer to his employees in an established policy, whether the amount is determined on a time, task, piece, commission or other basis of calculation.

Under Oklahoma law, holiday pay, vacation pay, severance pay, dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee which are agreed on as an established policy are wages.

Title 40, Oklahoma Statutes 1975, § 165.11 defines the penalty for failure to pay wages or wage supplements:

> A. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is a voluntary party to or subject to a bona fide written agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who willfully fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty (30) days after such payments are required to be made by law or by agreement, shall be guilty of a misdemeanor, and each such failure to make payment as required herein shall constitute a separate offense. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.
>
> B. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses as agreed prior to contract-

ing said expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

Oklahoma's wage complaint procedures involves:

(1) A letter apprising the employer of the wage complaint, reciting the law and the criminal remedy and asking that the employer respond or pay.

(2) If after the 2nd notice to employer we feel the wages are due and owing based upon the facts, we ask the District Attorney to prosecute. Penalty for failure to pay wages is a misdemeanor—*punishment is up to a $500.00 fine, one (1) year in the county jail, or both.*

In 1983, the Oklahoma Department of Labor received 3,058 claims. During that same year, the Department collected approximately $500,000 on 1,197 claims and referred to civil or criminal court an additional 1,147 claims involving more than $1,000,000.

VERMONT

In Vermont, when an employer has a written policy or other written agreement to pay its employees benefits or wage supplements, then, upon failure to pay such benefits, the employer becomes liable to its employees for actual damages and, in the event of fraud, is subject to criminal prosecution. *See* Title 21, Vermont Statutes Annotated, Section 345a.

A terminated employee who has failed to receive severance pay pursuant to his employer's written policy or agreement may complain to the Wage and Hour Division

of the Department of Labor and Industry for assistance. The Wage and Hour Division will investigate the claim and attempt to resolve it on an informal basis. Approximately two thirds of the complaints made to that division are resolved this way. If the unresolved complaint involves fraud, the Department of Labor and Industry will pursue criminal charges against the employer. If no fraud is involved, the employee is told of his right to sue for actual damages, and the Department's investigation file is made available for his use in the lawsuit.

WISCONSIN

The Wisconsin Department of Industry, Labor and Human Relations enforces Chapter 109, Wisconsin Statutes, "Wage Payments, Claims and Collection." This chapter requires employers to pay to every employee, at least once per month or within 15 days after termination, all wages earned. For the purpose of Chapter 109, "wages" are defined to mean remuneration payable to an employee for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses, and other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy. The Department investigates and tries to adjust controversies between employers and employees as to alleged wage claims. If the Department finds wages are due and an employer refuses to pay, it may file a lawsuit against the employer when the employee has assigned his claim to the Department. Chapter 109 grants a lien to the Department upon the property of an employer for the full amount of any wage claim

assigned to it. This lien is given precedence over all other debts, judgments, decrees, liens or mortgages against the employer. In a case where an employer fails to pay wages as required by Chapter 109, he is subject to both criminal penalties and increased liability of up to 50% of the wages owed. While precise statistics are not available, a significant portion of the wage claims investigated by the Department under Chapter 109 are severance pay claims.

Certificate of Service

I hereby certify that I have this day served copies of the foregoing Brief of *Amici Curiae* State of New York, *Et Al.* upon:

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This 31st day of December, 1985.

/s/ ANDREW SCHULZ

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